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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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vs.

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vs.

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vs.

EDGAR S. GRIFFIN, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 20, 1947.
CERTIORARI GRANTED MARCH 10, 1947

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33730 Washington, D. C.,
Tuesday, March 5, 1940.

33735 JOHN J. PORTER, called as a witness for the Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Werle.

33736 I am president of the North American Cement Corporation, and have been with the company since its organization in 1925; and have been president since the fall of 1932. During the period from the formation of the company in 1925 until I became president in 1932, I was vice president and general manager and a director of the corporation. As vice president and general manager I was in charge of the operations of the corporation plants. Before I became associated with North American I had been connected with the Security Cement and Lime Company since the spring of 1913. I started in with them as assistant to the president. After a year I was made general manager; after another year I was made vice president and general manager and I continued in that
33737 position until I went with North American. Prior to my connection with the Security Cement and Lime Company I had for a time been associated with a consulting geologist by the name of Charles Catlett, and had done work for him in connection with the location of cement raw materials and the promotion of a cement plant.
33738 I had also been an assistant professor of chemistry in the University of Cincinnati for a period of five years.

33739 I was familiar with the circumstances under which
33744 North American was organized in 1925. North American was formed by the purchase of two cement plants, the plants formerly being owned by the Security Cement and Lime Company and the Helderberg Cement Company. In addition Security had owned the lime plant. The Helderberg plant is about 40 miles west of Albany, New York. When North American began to operate, it had the Helderberg plant in New York State; the Security Cement plant in Maryland; and a lime plant in Martinsburg, West Virginia. North American is still operating

all of the original plants at those two locations. The plant at Catskill, New York, was acquired by purchase in 1926. Prior to its acquisition the Acme Cement Company was operating that plant. The original mill at Security, Maryland, was put in operation in 1909. I am familiar with the
33746 reason for locating that plant at that point; very much so. I prospected the property and examined the raw materials; at the time I was employed by a Mr. Charles Catlett, the consulting geologist.

By Mr. Werle:

Q. What raw materials—

Trial Examiner Norwood: Now, I take it, that you are trying to show another reason for transferring this property besides the one which should be indicated by that exhibit you cited to me a while ago. Is that the idea?

Mr. Werle: Well, I would say it relates to that same subject. It relates particularly to a series of Commission's exhibits and questions and answers brought out by Commission's Counsel in their own case, in connection with the location of cement plants.

Trial Examiner Norwood: Well, we have dropped that subject of whether or not plants are economically located unless you propose to prove that the plant is not economically located.

Mr. Werle: I don't quite follow that.

33747 Trial Examiner Norwood: In other words, it doesn't meet the issue.

Mr. Werle: Well, the issue is whether or not they are economically located, and I can't understand how we should be expected to prove that they are not.

Trial Examiner Norwood: The allegation is a condition of trade restraint with neighbor plants not economically located to continue in business; I don't see how you can meet that unless you show that there was a plant not economically located that did not continue in business.

Mr. Brick: Well, I think it may go a little further than that, if Your Honor please, in that the Government has taken the definite position, particularly in connection with the testimony of its economists, that if full and complete competition existed in this industry, that there would be uniform mill net prices, and that the plants of manufacturers would be close to markets, and they stated much closer than they are today under the delivered price method of pricing, so you have got there a comparison of

two situations: On the one hand, the present, which we claim is competitive, and, on the other hand, the Commission's situation, not only under Count 2 but through its evidence produced through its economists and others, that the uniform mill net method is the truly com-
33748 petitive method; and then in connection with these related situations as to locations of mills, it is necessary for us to show that there are greater economies afforded through the location of mills through sources of raw material rather than nearer or close by markets; that it is a situation which requires a consideration of many factors, not only the market and the raw material but fuel and the nature of the demand, and the volume of consumption. There are lots of factors to be considered, and I think it proper that we get into the record such of those factors as we think are essential in proving our position in the case.

Mr. Wooden: Your Honor, we have never attempted to show that any particular plant was uneconomically located. We have simply taken the position on theoretical grounds that given the existence of a combination proved by other evidence, that the theoretical necessarily inevitable effect of the combination is to produce that result, and unless they can show that all plants are equally well located, equally advantaged economically, they can't meet the issue at all except on theoretical grounds.

33755 By Mr. Werle:

Q. Will you tell us what the reasons were, or what the factors were which you took into consideration in the location of that plant of the Security mill?

Trial Examiner Norwood: There was an objection to that?

Mr. Werle: There was an objection, I believe.

Trial Examiner Norwood: Now, this doesn't relate to the sale of the plant, does it? I can't see any relevancy, and I will sustain the objection.

Go ahead.

Now, if the Counsel will furnish me with a written offer of proof as described we might be able to expedite this matter, and I understand that the Counsel has failed to do so.

Do I understand that the Counsel refuses to do so with regard to future witnesses, or just what is your position on that?

Mr. Werle: I haven't taken any position, Judge, with respect to the future witnesses; and I don't believe that I have refused to do anything as to this witness. I read your statement over very carefully; that is, the most recent one; I think it was some day last week. As I understand it, you were relating to some—you were discussing matters of general application among a number of
33756 companies. We don't propose to go into anything of general application with this witness. We propose merely to cover certain specific exhibits and certain specific testimony that is in this record that affects this witness' company, and of which this witness has knowledge; nothing further.

Trial Examiner Norwood: You are proceeding now to show where this plant is and the reasons for locating it that way in order to bear on the question of whether or not it is economically located; is that right?

Mr. Werle: To meet the evidence that the Government suggests that it was put there to take advantage of some kind of a pricing method, and that its location is bad and uneconomic. Mr. Wooden says he doesn't claim—

Trial Examiner Norwood: Well, I will overrule that question and overrule all that line of testimony; give the Counsel the benefit of their exception.

You may make an offer of proof on that now, if you want to.

Mr. Brick: I think Your Honor probably misspoke himself. I think you said that you would overrule the objections and overrule the testimony.

Trial Examiner Norwood: Yes, I thank the Counsel. I will sustain the objection.

Mr. Brick: I was hoping you were right the first
33757 time.

Trial Examiner Norwood: Sustain the objection, and the Counsel for the Respondents have their exception.

Mr. Werle: Well, as to that, I would like to take an exception and to just state as briefly as I can what this proof would be.

Trial Examiner Norwood: Yes.

Mr. Werle: That the Security plant is located at the point where it is because of the location there of limestone and clay and a shale property; that the freight rates from that plant were favorable into nearby markets, particularly the markets of Baltimore and Washington;

and that there was no consideration other than the question of raw materials and location of market places in connection with the location of that mill.

Trial Examiner Norwood: Counsel has his exception.

By Mr. Werle:

While I was associated with the Security Cement and Lime Company, I was familiar with the sales policies and the marketing practices of the company.

33758 At the time that the Helderberg property was acquired in 1925 by North American, I gave consideration to the desirability of the location of the Howes Cave plant with respect to raw materials and markets. The plant had practically unlimited reserves of raw material, and it was well located to reach certain

33759 markets and central New York State. We estimated that the reserves would run the plant in excess of a hundred years. It is about 40 miles west of Albany. That property was not acquired with a view to taking advantage of any method of pricing or anything of that character, (but) only raw materials and availability of markets.

The property at Catskill was offered for sale and we felt it was unusually well located to serve the Metropolitan market and we found on investigation that it had an ample supply of raw materials. During the years immediately preceding that acquisition in the summer

33760 shipping season we were operating at substantially full capacity. I recall the Tidewater Cement Company which operated a plant at Unionbridge, Maryland. In the days of the old Security Cement and Lime Company we felt the time would come when we would have an opportunity to buy the plant. After the Security Company had been acquired by North American the opportunity to buy did occur, and North American bid on the property, but failed to be the highest bidder. When we had an opportunity to buy that property, the company was in receivership. The Lehigh Company was the successful bidder, and I think that the Lone Star, or, at that time, the International Cement Company, was also a bidder.

Q. Were there any negotiations or communications or conferences of any kind between the Security Cement & Lime Company and the Lehigh Company, or any other bidder on those properties in connection with the

33761 bids?

A. Well, at that time the Security Cement & Lime Company had been—was not in existence.

Q. I see. I should have said the North American Company.

A. There were no conferences, or anything of that sort, between the North American Corporation and the Lehigh or International; in fact, we were very much surprised when we found that they had outbid us.

Q. Did I understand you to say that it was the North American Cement Corporation that was the bidder in this case?

A. That is correct.

Q. Had there, to your knowledge, been any cooperative action taken by cement manufacturers against that Tidewater Company?

A. No.

We have increased the capacities of some of our plants since the formation of North American. At Howes
33762 Cave we installed an additional kiln in 1926 which increased the capacity 50% above what it had been. The Catskill plant was in the course of rebuilding when we bought the plant, and on completion of that rebuilding the capacity there was very largely increased.

33763 Q. Now, as to these figures of your capacity, have you used any particular formula for arriving at those figures?

A. Not those figures. Capacity is a rather controversial subject, and those particular capacity figures are just based in a general way on the maximum that we have been able to get from our plants over limited periods of time.

Q. Has Mr. Mallory had anything to do with determining those capacity figures for your company?

33764 A. No, not those figures.

Q. Will you tell us, just briefly, how those figures on capacity were determined by your company?

A. Well, I presume at the time we took the maximum output that we were able to get from our plants over a brief period of time, and projected that amount onto a yearly basis. Those figures are quite theoretical, and are used chiefly for advertising and publicity purposes.

Q. Well, in taking this monthly operating record as you suggested, did you take the three highest consecutive months of operation?

A. Not for those figures. We have some other capacity figures that are based on the three highest months—that is, three highest consecutive months of clinker production projected on a 12-month basis.

Q. Now, tell me this: During the period 1925 and 1926, I believe, just prior to an acquisition of this Catskill plant, did you find that you were able to produce 1,800,000 barrels at Security, 1,200,000 barrels at Howes Caves in any year?

A. Not for any year, no. We produced at that rate for short periods of time.

Q. Then, will you please explain why you sought this additional capacity at the Catskill mill, if you were not using, as you suggested, your full annual capacity that you had at that time?

33765 A. Well, there were two reasons. In the first place, we were operating our present plants at their maximum capacity during the heavy shipping months, and we needed additional capacity to help out on the demands of our trade during that particular period. In addition to that, we expected to enter a new market, the Metropolitan New York market, with the Catskill plant, and we were not at that time shipping a great amount into that market from the other plants.

Q. Well, will you explain why, then, you did not operate your mills at full capacity in the winter months and store that cement for the summer time?

A. We did not have sufficient stock-house capacity to fully take care of the excess production during the winter months, and stock-house capacity is expensive.

Q. Will you state whether or not the increasing number of specifications on cement have affected that stock-house situation at all?

33766 A. Very much. We have a great many more specifications than we had back in the '20's, and, therefore, have to carry many more different kinds of cement in bulk, and also the increased fineness of grinding of cement means that a given bin holds less cement now than it did at that time.

By Mr. Werle:

Q. Now, from the operating standpoint do these increased specifications have any effect on capacity?

A. Yes, our capacity has been reduced by some of these newer specifications, because we have to burn harder, thus restricting the kiln output, and we have to grind finer, thus restricting the output of our finishing mill.

Q. Well, now, are there any other further factors which

affect the capacities of your plant, or those figures as they appear in the record?

33767 A. Well, those figures that appear in the record, as I said before, are purely theoretical, and do not represent our practical capacity at all. There are all sorts of factors that affect practical capacity. One of them, of course, is our success in getting contracts that will take shipments during the winter time. That varies from year to year. There is not—there isn't any way that I know of to figure accurately a practical plant capacity. There are all sorts of ways of figuring theoretical capacity.

33769 Q. Will you explain what use you make of your capacity figures?

A. Well, we use them in various ways, I guess. We have, in the past, when business was good, we have used them to—as a guide in the taking of business and in the solicitation of contracts. At the present time, of course, we have no use for them in that way, but we calculate our ratio of shipments to capacity and compare that with the ratio of shipments of the industry to industrial capacity, and in that way get some measure of how efficiently our sales department is performing.

33774 Q. Now, will you tell us what your reason for making your comparison with the industry shipments generally, or with shipments of your competitors in the district is? Will you explain why you do it that way?

A. Well, we have to have some means of measur-
33775 ing the efficiency of our sales department, and that is certainly the best measure that we can get. The fact that our shipments increase one year over another doesn't mean anything at all, because the total volume of cement consumed may be very much larger. It is the proportion that we get of a total going business that is important.

Q. What figures are available to you showing consumption in the areas where you sell?

A. The Bureau of Mines publishes figures monthly showing—they have two sets of figures. They show consumption by States and they show shipments by the plants located in the certain districts.

33776 Q. All right, if you have finished.

Now, when you say that you use certain of these figures, in determining the results that you are getting

from your sales force, which of the figures available to you do you use for that purpose?

A. Well, we only have one set of figures avail-
33777 able for the industry, those published by the Bureau of Mines, and we use those. Now, for our own capacity figures, we use figures prepared in the way that we believe the Bureau of Mines works up their figures. In other words, we take the three largest months of consecutive clinker production in the history of each of our plants and project that onto a 12 months' basis.

Q. Tell me, is there any particular percentage of the available business that your company strives to get, Mr. Porter?

A. No, we try to get as much as we can. We do have in mind that if our percentage of shipments to capacity falls below that of our competitors, that we are doing a darn poor job, and we make special efforts to increase it, but we try invariably to get as much as we can.

The witness identified Resp. Ex. 2395 as a copy of one
33778 of North American's monthly records. This record is prepared monthly. It is prepared under the immediate supervision of its statistician, Mr. Van Noy. It comes to the witness' desk regularly every month. It is one of the actual reports that are issued. There are several copies made which go to different executives. The witness originally drew up this form and showed the statistician how to work it out. The figures are based on the records of the Bureau of Mines, plus North American's own records of shipments (indicating). This is the record that shows monthly North American's percentage of the business that it's getting. It shows it not only in totals but by states so that we can check up on individual sales territories.

33779 (RESP. EX. 2395 was offered and received in evidence.)

Q. According to Commission's Exhibit 3068-A, B, and C, Mr. Porter, your company subscribed to a statistical service of Mr. W. S. Mallory beginning in July of 1927, and carrying through August of 1933. Is that in accordance with your recollection?

A. That is correct.

Q. Did the information provided by Mr. Mallory in that service come to your attention during that period?

A. Yes, some of it.

Q. Will you tell me whether or not you made any different use, or the same use, or what use you made of those statistics from Mr. Mallory during that period, as compared with the use you make of the current statistics which you get?

33780 A. We used Mr. Mallory's statistics in the same way we used the Bureau of Mines; the only difference being that Mr. Mallory's statistics came out about a month earlier than the Bureau of Mines, so that we were able to get quick information. We used the Bureau of Mines for our permanent records, and Mr. Mallory's figures for the—as a temporary guide until the others became available.

Q. Now, Mr. Porter, I would like to show you Commission's Exhibit 550-P-R, which purports to be a letter addressed to you by Mr. Mallory under date of October 11, 1933, and ask you whether you recall having received that letter (handing document to witness)?

A. Yes, I remember this letter.

Q. Will you tell me what prompted that letter? What the circumstances were?

A. The circumstances were that we were working on the Code for the cement industry under the N.I.R.A. I was chairman of a committee which had to do with the labor provisions of the Code, and Mr. Mallory, as statistician for the cement industry, was attempting to work up some figures on—I think it was—labor efficiency, something of that sort, to be used in connection with a presentation of the Code at an open hearing. In addition to that, I think Mr. Mallory was working on the possibilities of that provision of the Code relating to allocation plan—a plan for allocating business.

33781 Q. Now, I show you, Mr. Porter, Commission's Exhibit 550-M-O, for identification, and ask you whether or not that is your reply to Commission's Exhibit 550-P-R (handing document to witness)?

A. Yes, this is my reply to that letter.

33785 (RESP. EX. 2396-A, 2396-B, and 2396-C was offered and received in evidence.)

Q. Now, Mr. Porter, was this correspondence between you and Mr. Mallory concerned with any then existing plan of sharing business or rating capacities, or anything of that kind?

A. No, it was only concerned with a provision in the Code which was not in effect at that time, and never
33786 did take effect.

Q. Now, when you responded to Mr. Mallory's letter, I want to call your attention to his statement in here, referring to some plan of rating clinker capacity, and he says he has not been able to find any formula more equitable than the existing one. When you responded to that letter, what did you understand that he was referring to (showing document to witness)?

A. Why, I understand that he referred to the Bureau of Mines' method for rating clinker capacity of plants.

Q. Now, then, I believe that letter also states in connection with obtaining a company-man record for each plant, that such figures might then be used as a basis for a yardstick which would be more equitable than the existing one.

Now, in answering that letter what did you understand him to mean when he was referring to the then existing yardstick?

33787 Q. Yes. I have reference to the third paragraph at the bottom of page 1, where there is some indication of an existing yardstick.

A. Oh, yes. That existing yardstick refers undoubtedly to the Bureau of Mines' method of rating clinker production capacity of the various plants.

Trial Examiner Norwood: You mean, that is what you understood it to mean?

The Witness: That is the way I understood it to be, and that is the way I answered it.

33788 By Mr. Werle:

Q. Mr. Porter, in your letter, which is Respondents' Exhibit 2396, you make some reference to inefficient plants. Will you tell me what you had in mind, what you were referring to there?

A. Yes. I am very clear on that. Certain chain companies had certain plants which they were operating, and other plants which they were not operating, and I assumed that the plants that they were not operating were the least efficient of their plants, and that is the reason why they concentrated production in the others.

33789 By Mr. Werle:

Q. There is reference in your letter, or in Mr.

Mallory's letter, to the relationship between the number of barrels of production and the number of employees. Was it your understanding that that was the best test of the efficiency of the cement plant at that time?

A. No, not at all. There are many other factors of cost besides labor.

Mr. Werle: I would like the record to show at this point, Judge, that the next one or two questions, or so, will have some bearing on Commission's Exhibit 821-JJ and KK.

By Mr. Werle:

Q. Mr. Porter, during the year 1933, did the North American Cement Corporation have any arrangement with any other company or companies as to the percentage of shipments it ought to have in your district in relation to any other company?

A. No, we never did have any such arrangement.

Q. Do you know of the existence of any percentage sharing plan or anything of that character among any of the manufacturers in your district during the year 1933?

A. I do not.

Q. Do you know of the existence of any percentage-sharing plan, or something of that character, among
33790 any of the manufacturers in your district during the period of the N.R.A. Code, prior to the Code, or since the Code?

A. No, there was never any arrangement for the sharing of business or allocation or anything of that sort. There was the attempt to arrive at such a plan during the N.R.A., but that failed.

Q. Has your company ever been a party to any such existing arrangements?

A. We never have.

Q. Mr Porter, according to Commission's Exhibit 230-N and Commission's Exhibit 1370-A to D, you were appointed as a member of a committee on reconciliation of cement statistics at a meeting of districts 1 and 2 late in 1935.

Will you tell us to the best of your recollection what was the occasion for the appointment of that committee?

A. One of the reasons—one of the important reasons was that there were three bodies to whom we and other manufacturers were reporting production and shipments, stock statistics; namely, the Bureau of Mines, the Portland Cement Association, and The Cement Institute. Each of

those bodies required a separate reporting form and required the data set up in a different way, and it meant considerable amount of what I considered to be unnecessary work on the part of our accounting departments.

The other reason was that dues in both the Port-
33791 land Cement Association and in The Cement Institute were based on shipments, and I had the suspicion—I think others did also—that all companies were not reporting on the same basis. In other words, there were a number—there is not just one kind of Portland cement; there is a number of different kinds of cement, some of them Portland, some of them not Portland, and I felt that if we were reporting mortar cement, for example, and some other company was not reporting that, that we were being gypped on our dues, so I was anxious to straighten that out.

Trial Examiner Norwood: The dues to the Institute, you mean?

The Witness: And the Portland Cement Association.

By Mr. Werle:

Q. Well, as I understand it,—and you correct me if this is not so,—the dues in both those organizations were based on Portland cement shipments; is that correct?

A. Yes, I so stated in my answer.

Q. Oh, I see. I am sorry.

Did this committee on reconciliation of statistics ever authorize or request Mr. Mallory to endeavor to obtain from the Bureau of Mines figures concerning individual company shipments?

A. I have no such recollection. I don't think we—I am quite sure we did not.

33792 Q. During the period in which the North American Cement Corporation has been in existence, has that corporation been a party to any arrangement whereby it limited its production or the output of its plant in cooperation with or by an understanding with any producer or any other outside group?

A. No, not at all.

Q. Mr. Porter, let me direct your attention for a moment to the period when you were with the Security Cement & Lime Company again. During that period did you have any policy or any particular method with respect to the

manner in which you determined the prices for your cement?

A. Well, prices were always sold—always determined by competition. We met competition at the point where the cement was to be delivered.

Q. Over what area was the Security Cement & Lime Company selling cement in at that time?

A. We sold south as far as western North Carolina, west as far as West Virginia and central Pennsylvania, north as far as Harrisburg, Pa., and east as far as the Atlantic Ocean.

Q. Has there been any change in that marketing area since the plant of Security has been taken over by the North American Cement Corporation?

A. Only minor changes. At one time we sold considerable amounts of cement in and around Norfolk, Va. After the rehabilitation of that plant down there, we
33793 couldn't compete effectively in service down there, and the price became—our net at the mill became less attractive, and we withdrew largely from that market. We occasionally go in there under special circumstances.

Q. Will you tell us just briefly what are the factors which determine the area in which you solicit business?

A. Well, there are several factors. One very important one, of course, is the amount that we can net back at our mill. Another one is our ability to give service. If we can't give substantially as good service or somewhere nearly as good service as our competitors, why, it is very difficult to get business, and it becomes expensive to sell it.

Trial Examiner Norwood: You needn't go into those details. We have had that explained to us so many times, that you can just say it is service, and so on. We know all about it.

Mr. Werle: Your Honor—

The Witness: There is one other point.

Mr. Werle: This company hasn't yet explained what factors determined its area, and I think Mr. Porter may have a little different situation here, if he is permitted to continue.

Trial Examiner Norwood: We got those differences.

The Witness: There was only one other point I was going to make, and that is the cost of soliciting in a
33794 given territory.

Trial Examiner Norwood: Yes.

By Mr. Werle:

Q. Now, when you were with this Security Cement & Lime Company operating that single mill, did you get different amounts at your mill on different sales, or were your nets constant?

A. No, we netted different amounts on different sales.

Q. Now, since the mill has been acquired by the North American Corporation, have you changed your policy with respect to prices in that area?

A. Well, for many years we did not, but in recent years we have changed our policy in certain respects. We still continue to meet competition at the delivered point but in some other respects we have changed somewhat.

Q. Will you tell us what those other respects are, please?

A. Well, the policy of the old Security Company, and for the North American Corporation for many years was to meet competition but not to initiate prices. A few years back there was a situation developed in Baltimore with respect to foreign cement. We felt very strongly that something should be done about it, and in view of the fact that nobody else took it on themselves to meet it, we initiated a price reduction there. That was the first occasion. The second occasion was where we—

Trial Examiner Norwood: Now, prior to your
33795 change of ownership there, then, you had no other policy than that which met competition at the delivery point; is that right?

The Witness: That is correct. Well, now, let me see. I won't say but what there were certain occasions when we followed price-cutting tactics, secret price-cutting tactics. Generally speaking, our policy was to meet competition.

Trial Examiner Norwood: Go ahead.

A. (Continuing.) I think the second occasion on which we deviated from our previous policy was when we initiated a base at our Security mill. Well, I think it was about two years ago.

By Mr. Werle:

Q. Now, when you say you established a base at that mill, will you tell us what you did? What were the mechanics of that operation?

A. Well, the first thing we did was to assemble some figures and to calculate what base we would have to put in

that would be effective in the area immediately surrounding the mill and yet would give us the highest possible mill net. After we had decided on that the next thing that was done was to write a letter to our district sales manager in Baltimore and tell him to send out quotations to the customers. The next thing that was done was for that district office to send out quotations to—oh, I have
33796 omitted one step.

The next thing that was done was for the district sales manager to calculate the—to calculate the delivered price at each of the points in that area, using Security base plus the freight rate. Then the district office then sent out quotations to each customer at each of those points, stating the new delivered price.

Q. Now, in establishing that base at your mill, to what extent did you figure up your costs and then add on a certain profit?

A. We didn't do that at all.

Q. Will you state the reasons for not doing that?

A. Well, there were prices in the field that were based on competition. We obviously couldn't get more than the prevailing prices. The only option we had was to reduce them, and our prices were already insufficient to give us a satisfactory profit, or, in fact, any net profit at all.

33800 Trial Examiner Norwood: Was the establishment of this new base subsequent to the issuance of this complaint?

The Witness: It was.

Trial Examiner Norwood: Well, I sustain the motion to strike.

Mr. Werle: As to that, Your Honor, it seems to me that we ought to be consistent here one way or another; I haven't any serious views as to whether we should continue beyond the complaint or not in most cases; but the Commission has continued beyond the complaint.

Trial Examiner Norwood: We have gone into that many—

Mr. Werle: If the Commission is going beyond the complaint, then I think we ought to be permitted to do so.

Trial Examiner Norwood: We have gone into that many times, and there is no use of going into it now.

Go ahead. If you have anything that refutes it,
33801 any evidence of continuing of a practice shown to have been employed prior to the complaint—

Mr. Werle: Well, this does refute it.

Trial Examiner Norwood: —that the Commission has heretofore submitted, you may bring in evidence to deny that continuance. I think that is all that is involved here.

Mr. Werle: Well, it seems, Your Honor—

Trial Examiner Norwood: That it was only received to show a continuance, because it threw light on what had gone before.

Now, if you are to bring out a number of white swans that were hatched subsequent to the issuance of the complaint, it doesn't meet anything in the testimony that is now presented, not logical.

Mr. Werle: I do not know what you mean by white swans. This company is a Respondent here, not a white or black swan.

Trial Examiner Norwood: Doesn't Counsel understand me when I refer to the swans?

Mr. Werle: I am not sure I understand that reference. As I understand it, the—

Trial Examiner Norwood: Well, we have been using that expression here for some time as a logical
33802 illustration. Supposing that the charge was that some swans are black, being a particular affirmative, then the production of evidence that some swans are not black—or that some swans are white—would not disprove the charge.

Mr. Werle: Well, I understand the charge here to be the illustration—

Trial Examiner Norwood: Logically, to meet that—

Mr. Werle: Excuse me.

Trial Examiner Norwood: So, I say, with reference to things that happened subsequent to the complaint, that often it is a question of bringing out a white swan, it does not prove that they did not exist prior to the complaint, or even after the complaint, numerous black swans.

Now, does Counsel understand me?

33806 By Mr. Werle:

Q. Mr. Porter, before the luncheon recess we had been talking about the establishment of a base by your company at your Security mill. Now, as to that, did you discuss that matter with any competitors prior to doing that?

A. I did not.

Q. Was that move made as the result of any understanding or agreement with competitors?

A. It was not.

Q. During the period that you were with the Security Cement & Lime Company, did basing points figure in the determination of your prices to any extent, and if so, to what extent?

A. Why, only indirectly. We met the competition at the points of delivery, and that was the sole basis on which we made our prices, but, of course, at the times of price changes our practice would be to pick up prices at a considerable number of delivery points and then to try to relate those to some particular basing point. In other words, to find the pattern of prices, and everything.

33807 If we succeeded in doing that, then we would not feel it was necessary to go further in finding—in determining the delivered price of our competitors at every single point to which we shipped.

Q. Now, during the period of the operation of that mill by the North American Cement Corporation, prior to the time that you established this base, was there any difference in your use of basing points than that which you have just described, or was it the same, or what?

A. No, it has been our practice right along.

Q. Will you state what were the reasons for operating this Security mill as a non-base mill?—I assume that's what it would have been called—during the period that it was so operated.

A. Well, the mill was originally promoted and built to take advantage of its lower transportation costs into the markets of Baltimore and Washington. The Security Cement & Lime Company naturally wished to continue to take advantage of that situation, and for many years they couldn't afford to do anything else. When the North American Cement & Lime Company—when the North American Cement Corporation took it over they continued the same practice, and very shortly after the formation of that company prices began to decline, and the corporation felt that it needs to get all it could for its product, and that it was not in position to lower prices vol-

33808 untarily in any market.

Q. What advantage has your company reaped from having put in its base at Security?

A. I would say that we have reaped no permanent

advantage at all. We did reap a temporary advantage on one particular piece of business when we put it in.

33810 Q. What was the effect on prices in the area in and about your mill as a result of this base?

A. The effect was to reduce the prices.

Q. What has been the effect on your average net at the mill?

A. It has reduced our average net slightly.

Q. What effect, if any, was there on your volume of business, Mr. Porter, as a result of having lowered the prices in this area around your mill?

A. There has been no effect whatever, as far as I can determine.

33813 Trial Examiner Norwood: You have asked him for his opinion here.

33814 Now, you may ask him whether or not his sales increased or decreased after he put in this base.

By Mr. Werle:

Q. Will you answer that question, please, Mr. Porter?

A. Our sales decreased in the period following our putting in the base.

Q. Have any of your competitors ceased to ship into this area since you have established the base there?

A. I don't know of any of them that have stopped shipping into that area.

Q. Do you know of any competitors who have ceased soliciting business in that area?

A. No, I do not.

Q. Now, after the North American Cement Corporation acquired the Helderberg property, did you make any change in the method of selling in the area which that mill served from what you had been doing at the Security, or did you follow much the same policy?

A. We followed the same policies.

Q. Is your Howes Cave plant a base plant or a base mill at the present time?

A. It is not a base mill at the present time.

Q. Now, as to the marketing area that you cover from your Howes Cave plant, has that changed since the North American Cement Corporation acquired that mill in 1925?

33815 A. Only to a minor degree. At the time we acquired that mill, it was shipping into—shipping west practically to Buffalo, and subsequent to that time

two plants were built in Buffalo and we couldn't compete in service. The net realization at our mill was lowered and we withdrew from that market.

Q. Mr. Porter, according to your company's answer to the Burns and Clark questionnaire, Commission's Exhibit 969-6-J, according to the answer appearing on the page, the Catskill mill, you say, was considered a base mill by reason of its location. Will you explain that?

A. Well, we have right adjacent to our mill at Catskill two mills belonging to competitors. One of those mills has been closed down for some time; the other one has been operating and is operating as a base mill. Because of the fact that the freight rates from our mill to our shipping points are the same as the freight rates from our competitor's mill, the fact that this was a base mill in effect makes ours one also.

Q. Well, what competitor's mill are you referring to?

A. I am referring to the Alpha mill.

Q. How far is that mill from your Catskill mill?

A. Well, I think it is about a mile away.

Q. Can you tell me whether the freight rates from your mill are the same or different from the freight rates of this Alpha mill?

33816 A. They are the same.

Q. And points in the area?

A. I think to—they are the same, to all points; all delivery points.

Q. Now, in that same answer to this questionnaire, you state that the Hudson mill was a part of the Hudson River basing-point area. What did you mean by that? The Catskill mill, I mean.

A. There are three mills on the west side of the Hudson, and two mills on the east side of the Hudson, and those mills together are referred to in cement circles as the Hudson River group of mills.

Q. Did you or did the North American Cement Corporation have any understanding with any of the companies operating mills in the Hudson Valley area that your mill would adopt or use the base used by any or all of them?

A. We did not.

Q. Has there been any restraint upon you or your company which has caused you to refrain from using some other figure as a base at that point?

A. There has not.

Q. Now, in another part of your answer to this questionnaire, Commission's Exhibit 971-7-8, which is your letter to Dr. Burns under date of May 16, 1935, you refer to a difference of 10 cents between the base in the Hudson Valley and the base in the Lehigh Valley. As to
33817 that, to your knowledge, has there ever been any agreement or understanding between any mill or mills in the Lehigh Valley, or any mill or mills in the Hudson River area that some differential should be preserved between the bases in those two areas?

A. There has not.

Q. Has your company ever been a party to any understanding or agreement of that character?

A. It has not.

Q. Now, then, at another point in this answer to the Burns and Clark questionnaire, Mr. Porter, by your company, Commission's Exhibit 969-4-R, there is some reference there to criticism of the use of basing points by purchasers, and your answer in connection with that question was that the criticism has been almost entirely confined to purchasing agents of governmental units, and that there had been seldom any criticism by other customers. Will you tell me what criticism you had in mind when you were answering that question?

A. Well, the principal criticism that I know of has been by certain Government officials. Occasionally you will find some Government purchasing agent that wants to buy f. o. b. mill and criticizes directly or indirectly our delivered prices.

Q. Now, also, in this questionnaire answer, Commission's Exhibit 969-4-R, you stated that the aspect of the system mostly criticized was uniform prices and in-
33818 ability to get lower prices from nearby mills. As to that, Mr. Porter, why is it that when you are nearer to some particular customers than competitors are you do not give them lower prices?

A. Well, we want to get as high a price as we can for our product.

Q. Have you had any criticism from non-governmental purchasers located near your mills that they were not getting the advantage of their location?

A. I don't think I have ever heard such a criticism.

Q. Now, what has been your experience, Mr. Porter, during the twenty-odd years you have been in the cement

business as to whether or not there are certain definite base and certain definite non-base mills, the status of which does not change?

A. Well, I think there have been quite a large number of cases where mills—non-base mills have become base mills, and a few cases where base mills have reverted to the status of non-base mills.

Q. As to any given market area are you able to state that the certain base does or does not govern prices in that area?

A. I don't know what you mean by the word "govern." A mill base may be effective in making the delivered price in a certain area.

Q. All right.

Trial Examiner Norwood: Is there any stability about that situation in any particular localities?

33819 The Witness: Well, I think there have been some localities where there has been stability over a period of years, but there have been other localities where the situation has been just the reverse.

By Mr. Werle:

Q. Now, when you find, Mr. Porter, that prices in a certain area at a given time reflect some base, on the basis of your past experience how long do you assume that that base will apply as to that area?

A. Well, we don't know. There may be changes in a base at any time. We have to keep continually checking prices in the field in order to be sure that there have been no changes in effective bases.

Q. Do you mean you make such a check from day to day as you—

A. We do; our salesmen are in constant touch with the prices quoted by competitors.

Q. Mr. Porter, do you actually sell cement every day, or is it merely that you are soliciting business every day?

A. We actually sell cement every business day.

33820 Q. Now, Mr. Porter, referring again to your Burns and Clark questionnaire, Commission's Exhibit 969-4-S, it appears there in response to the question about the direction of change in your selling costs per barrel since 1925. You say it has been upwards until 1933, and since then downwards. Now, will you tell

33821 me up until what time that downward trend was true?

A. That downward trend was only in the years 1933 and 1934, and was due to a marked increase in volume in those two years compared with 1932. Since 1934 the trend of selling costs has been upward again.

33823 Q. Now, can you tell from your net on a given sale at the time that sale is made whether or not the sale will give you a profit or whether it won't.

A. No, you cannot.

Q. Will you tell me why that is?

A. Well, you don't know in connection with any given sale, you don't know what your total volume is going to be for the year. You don't know what your total cost is going to be for the year, and you cannot figure profits on any shorter unit of time than a year, because of the seasonal nature of the business.

Q. Well, in that connection, Mr. Porter, Commission's Exhibit 316-A is a memorandum which purports to have come from the files of your company. It refers to a minimum net that your company was going to use in August of 1935 (showing document to witness). Can you tell me what was the basis for that figure, if you recall?

A. Well, that applied to only one particular district office.

Q. Can you tell me over what period of time that applied? Was that some continuous thing, or what is your practice?

33824 A. Well, it is not continuous. I cannot tell just what period of time that applies to, but we have changed our ideas as to minimum net that we should accept very frequently, and we have—they not only vary with the time, but they vary with the particular sales territory you are considering.

Q. Will you tell me how you do this: If you are determining whether or not to take particular business, how do you go about that? Do you compare your cost with the net available on that business and determine whether or not you can make a profit on it and base your decision on that, or how do you work that?

A. Well, we don't do that. We can't determine whether or not we are going to make a profit on that particular business, but we do take into consideration the net mill realization along with other things.

Trial Examiner Norwood: You can approximate that, can't you, at any given time?

The Witness: It is very difficult, Judge. We attempt to do that. We draw up some rather elaborate charts in an attempt to approximate it. You can never be sure whether we are right or not.

33825 A. (Continuing.) Well, the other things are the manufacturing cost at the plant from which we would ship that business, and, particularly, our need, our needs for volume at that particular time.

By Mr. Werle:

Q. Well, as to your manufacturing cost, can you, on a given shipment, determine whether or not the net on that shipment will be greater or less than your manufacturing cost?

A. Well, yes. We can't determine our manufacturing cost exactly for any particular shipment, but I don't think we have ever taken business that was so close to our manufacturing cost that I couldn't say definitely that it was above it.

Q. Well, is your manufacturing cost substantially affected by volume?

A. Yes. Yes. It is affected quite a lot by volume.

Q. Would you state whether or not the same thing is true as to other costs?

A. Well, most other things are affected a great deal more by volume. Our overhead and selling costs, and particularly, our capital charges are practically constant for any reasonable period of time, and, therefore, the per barrel cost would depend almost entirely on the devisor or, in other words, the volume.

33826 The witness identified Resp. Ex. 2397 as a North American chart made up in the fall of 1935 in an attempt to show the probable relationship between the company's volume and the average net mill realization. North American has made similar charts at various times, they usually make up something along this line once a year.

Q. Would you in some instance of determining for some particular period of time a minimum net—would you or would you not base that decision in part on such a chart as the one you now hold?

A. We would.

Q. Have you explained what your purpose is in making up charts of that character from time to time?

A. Well, yes; there were several reasons. One of the principal reasons was to use it as a rough guide in determining whether or not it would be desirable to take any go after any given piece of business at a low net mill realization. Another reason is to attempt to forecast for my board of directors, attempt to give them some
33827 idea as to how we might come out for the following year on the assumption that we might be successful in getting a certain volume and certain average net price, and then I think we probably used it in other directions in policy making.

Q. Will you tell me whether or not you personally prepared that or it was prepared upon information which you gave?

A. Well, I laid out this chart and made some of the calculations and showed our statistician how to do it, and he completed the thing and drew it up.

Mr. Werle: We offer it (handing the exhibit to Commission's Counsel).

Mr. Wooden: Your Honor, we object to the exhibit as being incompetent in form, not showing or not producing and making available the basic data on which it is founded; and, further, that it is irrelevant and immaterial, as bringing in the subject of costs, the relation of costs to the selling prices; and, furthermore, that it is highly speculative, as an attempt to analyze the relation of future unknown demand and volume to selling prices.

33828 Trial Examiner Norwood: One point here: This is to show that the prices of this company bears some relation to the costs; that is, the price fluctuations?

Mr. Werle: No, Your Honor. This is to show what basis the witness has for trying to determine as he goes along how low he ought to go in his net on business.

Trial Examiner Norwood: How far he ought to sell outside of his own territory?

Mr. Werle: Well, I say it is primarily concerned with net. You recall Your Honor asked the witness whether he doesn't make some estimate of that, and he says, "Yes, we do try to make an estimate of it," and that is the estimate that he was referring to at that time.

33829 Trial Examiner Norwood: I can't say any useful purpose that that information would serve in this case as to just how far he goes to sell, or what is the basis of his decision. They have told us time and again that they sell as far as there is sufficient inducement, and sometimes inducement will make them go to one distance and sometimes it will go to another. It depends on their volume and it depends on business conditions, a great many things.

Now, to just show us exactly and particularly as to how he decides that question, I can't see that that is going to help us in any way whatsoever.

Trial Examiner Norwood: Now, you are putting in some graphs there where the objection is that the
33830 data on which it is based is not in evidence.

Mr. Werle: Your Honor, I have the basic data right here in my hand. There are several sheets of them.

Trial Examiner Norwood: Yes.

Mr. Werle: And if I may have this marked and turned over to Your Honor, and Your Honor decides that it is relevant and material along with this other, why, then, I will be glad to do that, and then Commission's Counsel may have it, and if they don't want to put it in, we will; but I don't think the basic data is necessary.

Trial Examiner Norwood: You have the basic data there?

Mr. Werle: I have it right here, yes.

33831 Trial Examiner Norwood: Just wait, all of you. Counsel has already stated that it is not offered for the purpose of showing that this mill's prices fluctuated with some relation to cost. I have considered everything he said here, and I can't see any relevancy whatever, and I shall sustain the objection. Anything of a similar nature that is in evidence, that was taken in with a mass of other stuff, is——for no other purpose than the one that Counsel has stated there, I shall entertain a motion to strike it.

33834 Mr. Werle: Before I do that, I don't want to neglect to have these other papers marked for identification, at any rate.

Will you mark these, please?

Trial Examiner Norwood: What are they?

Mr. Werle: These are the basic data, the figures upon

which this chart was prepared as this witness has described.

Trial Examiner Norwood: Well, that is the basic
33835 data on an exhibit which has been excluded already; is it not?

Mr. Werle: That is very true, Your Honor.

Trial Examiner Norwood: I do not see there is any necessity of going into it. Your have it marked there.

Mr. Werle: Well, I cannot make an offer of proof, frankly, Your Honor, orally because these figures are a little bit beyond me, and if we can have the witness tell us just as briefly as we can what these different sheets are, we will have them in the record, and then they are there for any purpose we might want to make use of them on exception or appeal.

The witness identified Resp. Ex. 2398-A as a comparative income statement for the years 1934 and 1935; Resp. Ex. 2398-B as a tabulation of costs relative to volume. They took the current costs including manufacturing costs, shut down costs, general and district overhead, selling expenses and dues for the approximate volume at which they
were then running and estimated the cost for other
33836 volumes in order to get points on which to plot the curves. He further identified Resp. Ex. 2398-C as the detail of the calculation of shut down cost; Resp. Ex. 2398-D as the adjustment of manufacturing cost to the additional taxes and some special repair costs that the company had in mind; Resp. Ex. 2398-E as the estimate of operating profits on products other than cement. Resp. Ex. 2398-A to E was the data upon which Resp. Ex. 2397 was prepared. Some of this data is actual records of the company. A great deal of it is estimates of what the result would be on the basis of increased volume of
33837 sales.

Q. Will you tell me whether or not you used Respondents' Exhibit 2397 to determine whether or not by lowering prices in and about your mill, or at any place, whether you could afford to do it, or whether you could not afford to do it?

A. That was one of the purposes for which we used it.

33838 By Mr. Werle:

Q. Mr. Porter, I would like to ask you the same

question that Mr. Wooden asked Mr. Harte while he was on the witness stand, if I can find it. (referring to official record). The question appears at page 8271 of the record, and reads like this:

"Why don't you take advantage of your local territory, the area of any of your mill create any local monopoly which you said could be created if you lowered the price there?"

Now, as to that, could you by lowering your prices around the area of any of your mills create any local monopoly for your company?

A. I don't think we could create a monopoly. We might somewhat lessen the volume of competition if we lowered our price sufficiently.

Q. Exactly. Now, could you lower the price sufficiently to keep other competitors out, and still be able to survive, yourself, at the new lowered prices?

A. Well, the calculations that we made indicate that it would be very unprofitable for us to attempt to do that.

Q. And by calculations that you made, what calculations are you talking about?

33839 A. Well, that one you hold in your hand is one example of the calculations that we have made—many calculations that we have made along that line.

Q. That refers to Respondents' Exhibit 2397, for identification; is that correct (indicating)?

A. Correct.

Q. Now, do you, in any sense, or have you, in any sense, maintained higher prices around your mill whereby other producers can ship into that area in return for their maintaining high prices around their mills, so that you can ship into that area?

A. If you mean to imply by that is there any agreement or understanding, the answer is no.

Q. Would there be any advantage of any kind to your company, or would there be any disadvantage to your company, in reducing prices around your mills to the point where no other competitor would find the business to his liking?

A. Well, we have repeatedly made calculations to determine that point, and invariably we have found that we would be at a very great disadvantage by doing that.

Trial Examiner Norwood: That is, if you maintain a

uniform mill net based on the same mill net for distant sales as you would get from a reduced local business?

The Witness: No, I was not referring to that, Judge, I was simply referring to the fact that we would
33840 have to reduce the price so low around our mill in order to keep out competition that we would have no profit on it ourselves.

By Mr. Werle:

Q. Mr. Porter, I want to come to another subject, the subject of trucking, at this point.

I believe the record shows through your answers to the Burns and Clark questionnaires that you at one time made deliveries to customers' trucks at each of your mills; is that correct?

A. Yes, that is correct.

Mr. Wooden: Your Honor, just a moment.

I would just like to inquire whether we are going into, again and again, this subject of trucking with every Respondent in this case, or with an indefinite number of Respondents, or whether they intend to show something different on the subject than has already been shown dozens of times?

Trial Examiner Norwood: What are you going into now with regard to trucking?

Mr. Werle: Well, I think that that is just an unfair position for Commission's Counsel to take. I have asked this witness one question about trucking, and now I have to make an offer of proof as to everything I want to show about it.

33841 Trial Examiner Norwood: Here is the fact,—the fair position for the Trial Examiner to take, and that is that the mere fact that cement is carried away from the mill on trucks where that cement is sold on a delivered-price basis, is not of interest in this case at all.

Mr. Werle: I am not going into that question at all. I am going to ask him some questions about inferences in the record which affect his company on trucking. His company is charged with certain things about it in this complaint. There are certain exhibits in the record which cast some inference against this company, and I certainly think that no matter what those inferences are that so long as they are in this case we have a right to meet them.

Trial Examiner Norwood: If Counsel will just go to

those points that are brought out and not bring out any long story.

Mr. Werle: That is all I intended to do. I made that statement this morning, Your Honor, when I said that I thought we would not come within that statement of Your Honor—that we were going to try to confine ourselves to particular documents, exhibits, or testimony, and I think that we have done that so far with this witness, and I do not intend to change that.

Trial Examiner Norwood: All right.

Mr. Wooden: I want to point out to Your Honor
33842 at this time that I have no objection to their going over with this witness particular matters in the record affecting this company.

Trial Examiner Norwood: Yes.

Mr. Wooden: Or in showing that the policy and practice of his company is different from what we have heard innumerable times before; but I do object, in view of the fact that the record shows—and we are perfectly willing to admit—that this witness and his company may have the benefit of all testimony given hitherto on the subject of trucking; there is no use of repeating that kind of testimony.

That is all I want to say.

Mr. Werle: Well, what testimony given hitherto? By whom?

Trial Examiner Norwood: By the Respondents' witnesses, I assume.

Mr. Werle: I do not see how a witness can be expected to adopt something that some other witness has found at his mill.

Trial Examiner Norwood: It is not a question what the witness should adopt; it is a question that you should adopt.

Mr. Werle: I do not see how the Counsel can adopt it if the witness cannot adopt it.

33843 By Mr. Werle:

Q. Now, Mr. Porter, as to the trucking that your company did, while you were trucking did that trucking have the effect of reducing the net that you received or did it increase them or wasn't there any change?

A. Well, at our Howes Cave plant, it reduced our net because we put in at that time a mill base in connection with

trucking. At the other plants I think our mill net was probably increased somewhat because we added a service charge at least during a greater part of that time
33844 we had a service charge for the loading of trucks.

Q. I want to show you Respondents' Exhibit 709, Mr. Porter, which is in the record as an announcement of your company, dated June 8, 1932.

First, let me ask you: Who in your company made the final determination to eliminate trucking?

A. Why, I did.

Q. In this announcement the statement is carried that: "A decision to eliminate trucking"—it is directed to dealers—"will better serve your interests as a building material dealer."

Will you tell me what you had in mind on that, what it meant?

A. Well, we had had a good many complaints from dealers on trucking. I think I might sum it up by saying that trucking from the plants—we were in effect going into the retail business, and some of our dealers objected to that very strongly.

Q. Did that present a serious problem to you or was it a problem that wasn't of any consequence?

A. Well, it was a serious problem to us. The good will of our dealers is very important, and to the extent that some of our good customers objected to our permitting trucking, it was a serious matter to us.

Q. Now, your Burns and Clark questionnaire
33845 answer, which is in evidence as a Commission's exhibit, states that you abandoned trucking at the Security mill in August of 1932. In the light of that announcement that you now have, can you tell me whether or not the Burns and Clark questionnaire answer is correct, or whether this announcement is correct?

A. This announcement is correct. I presume we must have made a mistake in answering that Burns and Clark questionnaire.

Q. Did your company eliminate trucking at your Security mill before anyone else eliminated trucking, or did you do it afterward or at the same time?

A. Well, my recollection is that one of our—some of our competitors stopped trucking first, and that made it—what we felt made it possible for us to stop trucking.

Q. At the time that you decided to abandon trucking at the Security mill, did you know of any general movement on foot to abandon trucking generally throughout the East, or any such movement as that?

A. No, I did not.

Q. Now, as to the abandonment of trucking at your other mills, was that done pursuant to any arrangement or understanding with competitors?

A. No, it was not.

Q. Do you recall the price war of 1931, Mr. Porter?

A. Yes, I do, very distinctly.

Q. From your experience at that time, to what
33846 extent was that price war caused by the use of trucks and truck delivery?

A. It was not caused at all by the use of trucks, as far as my experience and information goes.

Q. Have you had any arrangement or understanding or agreement with any competitive companies or with any outside sources since 1932 that your company would not resume deliveries to trucks?

A. We have not.

Q. Have you continued not to load trucks at all of your mills since 1932?

A. No, we have loaded trucks in some cases.

Q. By that do you mean customers' trucks?

A. Customers' trucks, yes.

Q. Do you have any particular case in mind?

A. Yes, the case that I recall was at our Howes Cave mill, where we loaded trucks to meet competition initiated by the Huron Company at their silos at Oswego.

33847 Q. What has been your experience, Mr. Porter, as to your customers? Have they frequently demanded the right to take delivery on trucks at your mills?

A. In only a very few instances.

Q. During the period that your company was delivering to customers' trucks, do you have any recollection of the amount of cement that was moved in that fashion from your mills?

A. I can't give the figures, but I can say that it was a very small amount relative to our total shipments.

Q. Could you estimate what percentage of your total shipments it was at the peak?

A. Well, I would say that it was less than five percent.

Q. Now, the record also shows, Mr. Porter, that your company at one time imposed a 15-cent charge for truck delivery at all of our plants. Is that correct?

A. That is correct.

Q. Can you tell me briefly what the reasons for that were?

A. There was a considerable extra cost in handling trucks and our plants were not equipped to handle trucks conveniently or economically. We had a good deal of labor trouble in connection with the loading of trucks. Our accounting costs, clerical costs, were considerably increased, and it was a nuisance generally. We felt we were entitled to get a service charge for it. Of course, if none of our competitors had made a service charge we couldn't have—
33848 we couldn't have gotten it, but when some competitor put in a 15-cent service charge, why, we were tickled to death to follow that.

Q. As to that, did your company have any arrangement or understanding or agreement with any of your competitor companies that you and they would put in some service charge for truck delivery?

A. We did not.

The witness identified Resp. Ex. 2399 as a North American announcement referring to its mills at Catskill and Howes Cave.

(RESP. EX. 2399 was offered and received in evidence.)

Mr. Capen: Your Honor, in order to comply with the suggestion Your Honor made, we have eliminated
33849 certain questions that we had planned to ask Mr. Porter.

I would like to at this time offer an oral stipulation on the record that if Mr. Porter were asked he would testify that from the point of view of the North American Cement Corporation they have found the practice of trucking highly unsatisfactory; that their plants are not equipped to handle trucks; that it would involve friction with their packers, the men who load the cement; that it meant increased cost in the packing department, increased and greater work and expense in the accounting departments because of billing in small lots instead of large lots; and that in certain cases they strongly suspected the truck drivers were selling the cement off the truck before it reached its destination, and that it also meant complaints from dealers

that they were being undersold by other dealers in their home towns. And that the result was that the North American Cement Corporation was extremely anxious to eliminate trucking, and as soon as they found that their competitors had done so, so that this was not a competitive practice with which they had to contend, they followed suit.

I offer that stipulation to shorten the record.

Mr. Wooden: The witness has heard the statement of Counsel. If the witness will say briefly that he would so testify I think that is the end of it.

33850 Mr. Capen: I will ask Mr. Porter: Would you so testify?

The Witness: I would.

Mr. Wooden: That is the end of that.

Trial Examiner Norwood: I will stipulate that he has already testified to a part of that.

By Mr. Werle:

Q. Mr. Porter, I show you Commission's Exhibit 806-3-E and 3-F, which appears to be a letter addressed to you under date of October 25, 1935, from Mr. Stark of the Universal Atlas Cement Company, and ask you whether or not you recall having received that letter (showing document to witness).

Mr. MacIntyre: What is that exhibit number?

The Reporter: 806-3-E and 3-F, for the Commission.

A. Yes, I remember receiving that letter.

33851 Q. I show you Respondents' Exhibit 2400-A and B, which also bears a Commission's exhibit number, for identification, 806-3-G and 3-H, and ask you whether or not that was the letter which you wrote to Mr. Stark and which brought the response, Commission's Exhibit 806-3-E and 3-F (showing document to witness)?

A. Yes, this was my letter to Mr. Stark written about a week earlier.

Q. Now, will you explain, please, Mr. Porter, what was the purpose of this correspondence with Mr. Stark?

A. Well, about that time we were trying to determine what our sales policy should be in the New York market with respect to foreign competition. There had been a very sharp increase in imports into that market and we were becoming fearful that if they continued to increase there

would soon be no market left for domestic cement. We had in mind—

Q. Let me interrupt you just there, Mr. Porter: Who do you mean by "we" when you say "we" throughout this?

A. I mean the officers of my company.

Q. All right.

A. We had some time prior to the date of that correspondence reduced the price of cement at docks in Brooklyn in an attempt to make the market less attractive to our foreign competitors. In doing so we had hurt ourselves very materially. It was a very low price, and it hurt us badly, and I was trying to determine whether it was
33852 necessary to continue along that line, or whether it was necessary to go further along that line. And one of the elements in determination was such information as to what the cost—or what the cost of Belgian cement would be laid down in New York or delivered to the dealers in New York. I had some data in my files on the subject accumulated from various sources, and I put that together and made the best calculation that I could. I knew that Mr. Stark was somewhat of an expert on foreign cement, and because at some past time he had been sent abroad by a company that he was associated with to study Belgian cement abroad, and, further, than that, he had served on a tariff committee of The Cement Institute, and had had occasion to study foreign competition rather extensively. So I got together my own calculations and sent them over to Mr. Stark and asked him if he would be so kind as to look them over and tell me if I had made any mistakes, and to make any corrections that he could.

Q. And does Respondents' Exhibit 2400-B represent the calculations that you had made (showing document to witness)?

A. Yes, yes, this represents my calculations. Here is a question mark in one place there where I couldn't fill in one figure (showing to Counsel). Do you want me to speak on that?

Q. No, that is all right.

33858 Q. Well, now, Mr. Porter, just let me ask you this one question: Was this correspondence of yours with Mr. Stark in any way attempting to work out with him or with his company some selling policy in connection with imported cement?

A. It certainly was not.

Q. Having had Mr. Stark check these estimates of yours as to the costs of foreign cement in Brooklyn, will you tell us what you intended to do with them after you had them checked?

A. Use them only for information in deciding on our policy in the New York market.

Q. Had you been discussing this matter with Mr. Stark prior to this exchange of correspondence?

A. I had not.

Q. The record shows that your company put in a special price in Brooklyn in July of 1935. Let me ask you whether you had any discussions with Mr. Stark or anyone in the Universal Atlas Cement Company in connection with putting in that special price in Brooklyn?

A. I had not discussed the matter with him or with anyone else representing our competitors.

Q. Did you put that special stock in Brooklyn as a result of any arrangement or understanding or agreement with any other companies?

A. I did not.

Q. After you received this letter from Mr. Stark, which Commission's Exhibit 806-3-E and 3-F, did you discuss the matter further with him?

A. No, I had no further communications with him on the subject.

Q. In December of 1935, the record shows you took that special stock of cement out of Brooklyn. Will you tell us what were the reasons for doing that?

A. The immediate reason for doing it at that particular time was because the Hudson River was getting to the season when—it was getting to the season when the Hudson River would freeze over and when we could no longer make water shipments to Brooklyn. We had been watching the monthly figures for imports very closely, and we had noticed that during the latter months of the year that the imports had fallen off considerably. We got some encouragement from that and felt that in view of the increasing cost of transportation from our mill at Catskill to Brooklyn, that we were justified in taking out those stocks then.

(RESP. EX. 2400-A and 2400-B was offered and received in evidence.)

By Mr. Werle:

Q. Mr. Porter, I think just before we went off the record here, you said that you discovered in connection with removing this Brooklyn stock that imports were declining. Did you mean generally throughout the country they were declining, or what?

A. No, I meant in the Port of New York.

Q. I see.

Now, on this Respondents' Exhibit 2400-B, Mr. Porter, you have a figure "approximate price paid by dealer on lighter in warehouse," $1.50 in each case. Will you tell me what that refers to?

33862 A.—Well, this $1.50 is just what it says, the approximate price paid by dealer for Belgium cement delivered in Brooklyn.

By Mr. Werle:

Q. And the figure under that, $1.72. What is that?

A. That was our price delivered to the dealer at Brooklyn, which was put in for comparison.

Trial Examiner Norwood: What was that? What was that price?

The Witness: $1.72 compared with $1.50.

Trial Examiner Norwood: Was that based on a bulk shipment?

The Witness: Well, that is the price after deducting package and discount.

By Mr. Werle:

Q. Mr. Porter, was your company's action in placing these stocks in Brooklyn in July and removing them
33863 in December, 1935, in any sense a cooperative measure between your company and the other manufacturers in that area?

A. It was not. The plan was devised by Mr. Harte of our company, and after consulting with me was put into effect by our company entirely independently.

By Mr. Werle:

Q. Will you tell me as to your removal of the stock in December of 1935; was that done because you felt that your attempt there had failed to do what you thought it would do?

A. No.

Q. Had it failed or hadn't it failed? I don't care much which way the answer is.

A. No. As a matter of fact, we felt that the
33864 practice had been moderately successful. There for a few months there seemed to be some reduction in the imports of cement, and on the basis of the figures that we worked up, and that Mr. Stark helped me correct, showing there that there was only a 22-cent margin between their cost and our selling price, and we felt that at that margin that they wouldn't be able to largely increase their sales in this country.

By Mr. Werle:

Q. I just want to be sure the record is clear now as to whom you mean by "we." You mentioned Mr. Stark and you mentioned yourself and you mentioned your company. Now, whom were you referring to as to the "we"?

A. I am sorry, but when I say "we," I mean the officers of the North American Cement Corporation, chiefly Mr. Harte and myself, who were immediately concerned in this.

Q. Now, since the time you removed those stocks from Brooklyn, have you taken any other steps in connection with attempting to meet the competition of imported cement?

A. Not in New York. We did a year or two later in Baltimore.

Q. And what did you do there?

A. We put in what is sometimes known as an arbitrary and sometimes as a port price in the City of Baltimore for the purpose of reducing the price at that point and making that market less attractive to foreign competitors.

33865 Q. That was the first case that there had been any such depressed prices in and around Baltimore?

A. Well, it had been the first occasion for a good many years. I recall that a great many years ago the Atlas Company put in an arbitrary or port price in Baltimore for a period of time.

Q. At that time that you put these depressed prices into effect, were they put into effect at any other place?

A. No, just in Baltimore and the territory immediately surrounding Baltimore.

Q. Can you tell me your reason for confining it to that area?

A. Well, that was the area where our foreign competition was. The foreign cement came in by water to Balti-

more and was sold to Baltimore dealers, possibly some dealers in the surrounding towns, and was trucked out from Baltimore to the suburban territory around there.

Q. Who made the decision to decrease the prices in and around Baltimore, as you have described?

A. I made the final decision.

Q. Are you wholly familiar with the reasons as to why that was done?

A. I am wholly familiar with the reasons, yes.

Q. Well, there is some reference in the record indicating that that was done for the purpose of
33866 keeping domestic competitors out of that market. Will you tell me to what extent that was one of the purposes of your policy, if it was?

A. Well, that was a subsidiary—rather, a minor consideration, and certainly we would not have reduced the price there on that basis alone; but having in mind the necessity of doing it to meet foreign competition, we also had in mind that it would probably result in preventing an increase in shipments from the Lehigh Valley into that market, and, to that extent, would benefit us still further.

Q. How many competitors would you say you have in the Baltimore area?

A. Well, I think there must be somewhere between fifteen and twenty cement companies that sell cement in and around Baltimore.

33867 Q. Well, Mr. Porter, do you attempt to keep advised of how your shipments are comparing with the shipments of your competitors from time to time?

A. Yes, I use every means of trying to determine that.

Q. Can you tell me whether or not after you put in these depressed prices in Baltimore you made any effort to find out whether the shipments of your competitors were increasing or decreasing into that area?

A. Yes, I made considerable effort.

Q. And as the result of that effort did you discover whether or not shipments of your competitors into that area were increasing or decreasing?

A. I was unable to get any exact figures; but the evidence all indicated that there was no material change in the amount of cement shipped in there by our competitors.

Q. Can you recall the date that you made these decreased prices in and around this Baltimore market?

A. No, I can't remember that date offhand.

Q. Can you recall the date on which your quotations announcing the decrease in prices were sent to your customers?

A. I am afraid not.

Q. Did you know those dates?

A. I did know those dates at the time.

33868 Q. Mr. Porter, I show you Respondents' Exhibit 2401, for identification, and ask you whether or not you can refresh your recollection from that and tell us the date that your prices in and around Baltimore became effective, and the date that your quotations were sent out (handing document to witness)?

A. Yes. This is instructions from our sales department to the district office, notifying them to make the reduction in price.

Q. Can you refresh your memory as to those dates from that?

A. Yes. This letter is written on December 22, and it is stated in the letter that the new prices are to become effective on December 28, 1936, and—

Q. And as to the date the quotations were sent out?

A. The instructions are to date the quotations December 26, 1936, effective December 28, 1936.

33869 Q. Mr. Porter, have you told us about that paper as to whether or not you can identify it as having come from the files of your company (showing to witness Respondents' Exhibit 2401)?

A. Yes, I can identify it. I saw the letter at the time.

(RESP. EX. 2401, was offered and received in evidence.)

Q. Now, as to these reductions in prices that you made in and around Baltimore, Mr. Porter, were they made as the result of any understanding or agreement or co-
33870 operative action with any of your competitors?

A. They were not. They were entirely independent—the result of independent action on our part.

Q. Now, what is the practice of your company, Mr. Porter, as to announcing to your competitors any reductions or increases in price that your company might make?

A. We don't make any such announcement or give out any such information in advance of the prices going out to our trade. After the prices had gone out to our trade, if anyone asks us anything about them, why, we have no objection to telling them.

Q. Since 1936 have you made any changes in these prices in and around Baltimore?

A. Yes, there have been some minor adjustments. The basic port price in Baltimore has not been changed; but we have run into difficulties at a few points around Baltimore where one dealer would complain that he was put at a disadvantage compared to some other dealers; and we have always tried to adjust those things to keep our customers happy.

Q. As to the practice in your company with respect to notifying your competitors about changes in your prices; do you know whether or not there was any deviation from that practice in connection with these changes in prices around Baltimore?

A. I feel sure there was not. Our policy is well understood by our executives. I know that I made no deviation, and I feel very sure that none of our executives
33871 would deviate from that.

Q. Does your company solicit or quote on business at any of the Gulf ports?

A. No, we do not.

Q. Has the North American Cement Corporation ever had any policy of refusing to sell to dealers who trade in imported cement?

A. No, we have had no fixed policy in that connection.

Q. Well, when you say you had no fixed policy—

A. I should say we have had no policy—

Q. —tell us what your policy was.

A. As you state the question, I would say we have no such policy.

Q. Well, do you have some policy that is somewhat like that? I mean, will you tell me what policy you may have had of that character?

A. Well, when this question—when foreign cement competition became acute, we decided on the basis of information we received as to how that problem had been handled in New Orleans prior to that time, that it was undesirable for us to sell dealers handling foreign cement, and we decided that we would not solicit such dealers, and that in the event they gave us orders, that whether or not we received those orders it would have to be decided on the merits of the case in each individual case.

33872 Q. In 1934, Mr. Porter, did the North American Cement Corporation have a district office?

A. We had several district offices.

Q. In Boston?

A. No, we had no district office in Boston at that time.

Q. In the usual course of your business, to what individual in your company would inquiries have to be referred which concern the policies of your company in Boston and in that area during 1934?

A. Well, our general policies would be interpreted for the Boston district by an assistant general sales manager by the name of Littlefield.

Q. Is Mr. Littlefield still alive?

A. No, Mr. Littlefield died about two years ago.

Q. Now, in connection with this policy that you had as to dealers who trade in imported cement, will you tell me in practice how strictly you observed that policy?

A. Well, I know that we did not solicit those dealers for a certain period of time, and I have no recollection of having had any orders from any such dealers offered to us.

Q. Did your company have any such thing as a blacklist of dealers to whom you would not sell cement?

A. No, nothing like a blacklist.

Q. During this period that we are talking of in 1934, did any such thing as a blacklist come to your attention?

33873 A. No.

Trial Examiner Norwood: Answer the question. You can show by cross-examination what "blacklist" means if anybody does not understand it.

The objection is overruled.

Did you have any kind of a list—a list of any kind?

The Witness: Well, I presume that our sales department made up a list of dealers handling foreign cement based on the reports of our salesmen.

33874 Q. Tell me this, Mr. Porter: This policy that you had, whatever it may have been at that time, was it adopted or was it carried out by the North American Cement Corporation as the result of any agreement or understanding with any other companies?

33875 A. No, we had no such agreement with other companies.

Q. The record shows, Mr. Porter, that you were a trustee of The Cement Institute during the year 1934. Let me ask you whether or not the question of selling dealers who handled foreign cement was ever discussed or taken

up at any—well, by a board of trustees of The Cement Institute?

A. No, I am sure it was not.

Q. As to the moves that your company made in connection with depressed prices both in Brooklyn and in the Baltimore area, was that matter discussed at any meeting of The Cement Institute at which you were present or at any meeting of the board of trustees, to your recollection?

A. It was not.

Q. Mr. Porter, I want to show you Commission's Exhibit 1339, which is an invitation on cement issued by the Procurement Division of the Treasury Department calling for bids on April 15, 1938, and ask you whether you recall having received that invitation (showing document to witness)?

A. Yes, I remember seeing this at the time.

Q. Was it brought to your personal attention?

A. It was.

Q. Was it customary for invitations on public lettings to be called to your attention personally, in your company?

A. No, that was not usual.

Q. Do you know who brought it to your attention?

33876 A. Well, it was one of our executives in the sales department. I have forgotten just who, at the moment.

Q. The record shows that your company did not bid on that; that is correct, is it not?

A. That is correct.

Q. I show you Respondents' Exhibit 41, and ask you whether or not that is the response which your company made to the invitation?

A. Yes, this is the letter we wrote in response to that invitation.

Q. Now, will you just look at that letter, Mr. Porter? You wrote that letter, did you, by the way?

A. Yes, I wrote this letter, personally, yes.

Q. You state in there that under ordinary circumstances you would be inclined to suggest a conference to endeavor to reconcile the differences, and so on. Will you tell me what sort of a conference you had in mind in writing that?

A. Well, I had in mind that the sensible thing to do would be to sit down with the representatives of the Gov-

ernment and see if we couldn't reconcile our trade practices with their desires and avoid a great deal of what seemed to me to be senseless and expensive procedure.

Q. And again in that answer when you use the words "for us to sit down with them," would you please tell whom you mean by "us"?

33877 A. I meant the executives of our company.

Q. Had you in the past held conferences such as the one you were proposing here?

A. I had never held any. I know that so far as I know we have never held any conferences similar to the one I was proposing here. There had never been any occasion for it.

33878 Washington, D. C.,
Wednesday, March 6, 1940.

33883 Mr. Wooden: Your Honor, before proceeding, and pursuant to an arrangement which I had with Mr. Werle yesterday, I would like at this time to put on the record the portions of the transcript and exhibit which are included in my general motion to withdraw or strike evidence relating to the costs and profitableness in connection with T. V. A. purchases.

Trial Examiner Norwood: Yes.

Mr. Wooden: Pursuant to that general statement of intention made on the record of February 20, I move to strike from the testimony of Dr. Arthur E. Morgan the following lines and pages:

Page 2049, line 4, to page 2056, line 10, inclusive;
Page 2074, line 23, to page 2076, line 11;
33884 Page 2078, line 10, to page 2080, line 12;
Page 2094, line 8, to page 2095, line 1;
Page 2104, line 20, to page 2107, line 11;
Page 2111, line 18, to page 2115, line 20;
Page 2137, line 22, to page 2138, line 16;
Page 2159, line 3, to page 2159, line 15;
Page 2167, line 1, to page 2167, line 21;
Page 2169, line 18, to page 2170, line 24;
Page 11284, line 6, to page 11290, line 7;
Page 11296, line 6, to page 11298, line 11;
Page 11299, line 15, to page 11303, line 23;
Page 11304, line 15, strike only the words "at a profit."

I move also to strike the following testimony of Major Edwin C. Eckels:

Page 2574, line 13, to page 2612, line 15;

Page 2615, line 16, to page 2628, line 23.

I move to strike the following exhibits, complete:

Commission's Exhibit 343-A, B;

Commission's Exhibit 348-A, B;

Commission's Exhibit 349-A, B, C;

Commission's Exhibit 351-D, E, F;

Commission's Exhibit 352-A to D, inclusive;

Commission's Exhibit 353-A, B;

Commission's Exhibit 353-C;

33885 Commission's Exhibit 389-A to G, inclusive;

Commission's Exhibit 390-A to C, inclusive;

Commission's Exhibit 391-B, C;

Commission's Exhibit 392-A, B;

Commission's Exhibit 393;

Commission's Exhibit 394-A, B, and

Commission's Exhibit 395.

I move to strike the portions of Commission's Exhibit 347-A to I, inclusive, which appear in that exhibit under the following heads:

"General description of the industry's marketing problem."

"The question of over tension of the cement industry."

"Obsolescence."

And under the heading "Efficiency in the Cement Business," strike only the paragraphs 3, 4, 5, 6, 8, and 9.

The evidence covered by this motion was never intended to be taken as establishing the costs of the proposed T. V. A. plant, or the costs of Respondent's plant, but merely to show the circumstances under which the Respondents acted in jointly arriving at their prices to T. V. A.

33886 The motion to strike or withdraw this evidence is made in order to remove the foundation for any claim by Respondents that such evidence raises an issuable fact, and on which collateral fact they might claim they are entitled to offer a large mass of cost data.

Trial Examiner Norwood: You mean raises an issue of fact as to costs?

Mr. Wooden: Yes, yes.

Trial Examiner Norwood: Yes.

Mr. Wooden: I am also making this motion in con-

sideration of the understanding I had of Your Honor's position that evidence along those lines and regarding those subjects would not be received, and that evidence already in the record relating to such subjects would, or might, also be excluded at some future time.

Trial Examiner Norwood: That is, that there is no issue involving costs as such?

Mr. Wooden: Profits and losses.

Trial Examiner Norwood: No issue as to what costs of production are.

Mr. Werle: Well, as to that, Your Honor, in the first place we would like an opportunity, of course, to look through these particularized parts of the testimony that Mr. Wooden refers to.

Trial Examiner Norwood: Yes.

Mr. Werle: And would like to reserve our right
33887 to make whatever motions or counter-motions that we may deem fit after we have had a chance to look it over.

33889 Trial Examiner Norwood: Well, the motion is allowed as far as striking that evidence and striking those exhibits.

Mr. Werle: Well, as I understand it, then—

Trial Examiner Norwood: The motion that I allowed is broad enough to include everything that is in the record of a similar nature; but before it can be struck I think it should be specified.

Mr. Werle: Well, as I understood Your Honor a week or two ago, these motions were granted at that time, and this was merely a particularization of the motion to date.

Trial Examiner Norwood: Yes, but he renewed the motion with respect to these particular ones, and I allowed that.

Mr. Werle: Well, we will be prepared, I should say—

Trial Examiner Norwood: Yes.

Mr. Werle: —within a week or so to make some response to this.

Trial Examiner Norwood: Yes.

33892 Mr. Werle: Well, before we leave this T. V. A. matter, so that I can understand it in reading the record, Mr. Wooden, am I correct in understanding that your motions this morning are made on all of the grounds that you have stated heretofore in connection with this

T. V. A. matter? That is to say, this relates to our discussions and your statements back at the time that Major Lewis was on the stand?

Mr. Wooden: It relates to all of that, but I want to make it clear, Mr. Werle, as I indicated on the day that Major Lewis was on the stand last, that I was going further than I had gone in the statements I made that day, and in moving to strike this testimony and evidence for all purposes, and I was abandoning the position that I had previously taken of limiting it, and that this motion made this morning is to strike these specific portions of the record for all purposes.

Do I make that entirely clear?

Mr. Werle: Yes, but the grounds of the motion
33893 are those that you have stated here this morning and have stated in the past, I mean?

Mr. Wooden: They cannot be because—or cannot be wholly—because I am moving to strike these now for all purposes, as I say, and simply because in an effort to make it unnecessary for you to go into the question further. If I tried to limit it, as I said, I felt that you would still insist on your right to go into it.

Trial Examiner Norwood: Yes.

Mr. Werle: Well, if it is not clear, of course we have objected to that and we reaffirm our objection now.

Trial Examiner Norwood: Yes.

Mr. Wooden: I suppose that means that they are objecting to the withdrawal of some evidence that they won't have to meet.

Mr. Werle: That isn't it at all. I think our position has been clear on this, and I want to make sure that we have an objection to this and we are not waiving anything until we have had an opportunity to study the
33894 whole record.

Trial Examiner Norwood: Yes. Counsel has his objection. The objection is overruled, and the motion is allowed.

33895 "It Is Hereby Stipulated And Agreed that the witness, John J. Porter, shall be deemed to have given direct testimony in these proceedings, as follows, with the understanding that such testimony shall not necessarily be exclusive on these topics, and that such testimony shall be read into the record and shall have the same force,

weight, and effect as though given orally by the witness on direct examination:

"North American Cement Corporation keeps currently informed concerning the delivered prices quoted and
33896 marketing methods employed by its competitors from field reports of approximately 30 salesmen, from reports made to it by its customers, and from information obtained through its representatives who are present at the opening of public bids. Any changes in such prices or policies are received within a few hours from these sources.

"North American Cement Corporation makes some sales direct to the consumer where the element of quantity, service and location of the work involved are such as to make this desirable. However, by far the greater percentage of its total shipments of cement is made through dealers in building materials (e. g., from 1926 to 1933, and average of 84 percent was sold through dealers). This method of distribution has proven economical and desirable for both the manufacturer and the consumer. At the present time, North American Cement Corporation has as its customers or potential customers some 900 dealers whom it is constantly soliciting and through whom its cement is delivered to the ultimate consumer in small quantities, with proper service and facilities to meet their normal day to day demand. Such distribution is the backbone of the business of North American Cement Corporation.

"The selection by North American Cement Corporation of its dealers is not based upon any understanding or agreement with any competitor or competitors, but is, and always has been, based upon the circumstances of each case.
33897 The primary considerations are credit, adequacy of equipment to meet the requirements of consumers in a particular location, and a willingness to push North American Cement Corporation's products (although most dealers also purchase and stock cement from several other manufacturers).

JOHN J. PORTER, thereupon resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Werle.

Q. Mr. Porter, yesterday afternoon when we recessed, we were discussing the letter which you wrote to the Procurement Division, which is Respondents' Exhibit 41, in connection with their invitation to bid in April, 1938, which has been referred to here frequently as the Good Friday bid.

As to your letter, Mr. Porter, you state that the provisions in the invitation involved practical difficulties of compliance by you as a manufacturer. Can you tell me what practical difficulties were involved, and what you had in mind in that statement? If it will help you, I show you Commission's Exhibit 1339, which is the invitation.

A. Mr. Werle, I can remember some of the diffi-
33898 culties I had in mind; I am not sure that I can pick them all out on such short notice.

Q. Well, do the best you can.

A. This proposal is very involved.

It is my recollection that there were certain provisions in the proposal that put the manufacturer under obligation to manufacture and keep on hand ready for shipment at any time cement of a certain specification, and we felt, after going over those provisions very carefully at the time, that there was a good deal of burden imposed on the manufacturer there. There might be a chance that after we made up this cement that it might not be taken; that we might be left holding the bag. That was one thing that I recall that we had in mind.

Another matter that we had in mind was that not knowing the destination or the use to which the cement would be put, we might find that the cement was being used on jobs which had in the past been supplied through our dealer customers, and that our dealers, if that would be the case—our dealers would certainly resent the fact that we were supplying cement in that way, and we would lose a lot of very valuable customers and good will with dealers generally. That, I recall, was one of the outstanding objections that we had to it.

Now, there were other objections, but I am not sure that I can find them.

33899 Q. All right, Mr. Porter. Will you take just as long as you need to read that and refresh your memory and find out so you can tell us what were the other matters you had in mind?

33900 The Witness: It is a pretty long matter, in fine print.

Trial Examiner Norwood: Yes.

The Witness: It is very hard to pick out the points on it without going through it very carefully.

A. Yes, I think I need not go through it any further. I find the thing—I knew there was something else that was very important, and I just couldn't recall what it was. I found it here now, and that is the provision that the successful bidder shall furnish cement to any and all people and agencies using cement on or supplying cement to projects, the construction of which is provided for by contract or otherwise subsequent to the date of this contract, and which are financed in whole or in part by the Federal Government, and the prices are not to exceed those stated in the bid.

33901 We took that to mean that the Government would have the right to apply cement furnished under this contract on any work which was financed in part, in any part, by Government funds. They might request us to furnish cement for the building of a residence on which there was a F. H. A. mortgage; they might require us to furnish contractors building State highways; and the terms of that are so broad that it seemed to us that it was just certain to get us into trouble with our regular customers.

I found a few other things that we noted, too, but they are of less importance.

D you want me to go into those?

By Mr. Werle:

Q. Yes. Will you, please?

A. Well, there is some provision here as to compliance with the minimum wages as determined by the Secretary of Labor. It is my recollection that at the time this contract was received that there had been no minimum wages determined at that time under the Walsh-Healey Act. The thing was still open. We didn't know what the determination was going to be, and according to our understanding

of this paragraph here, there was a good deal of uncertainty as to what we were letting ourselves in for.

Q. Is there anything else, Mr. Porter, or does that cover it substantially?

33902 A. No, I think that is all. I have already covered the uncertainty as to whether or not they would take the cement made under the various specifications.

Q. Yes.

Now, in your letter, which is Respondents' Exhibit 41, you proposed some sort of a discussion with the Procurement Division but mentioned that you thought it ought to be arranged under the auspices of the Federal Trade Commission, and that it be held without prejudice to your company.

Will you tell me what you had in mind there, please?

A. Well, we were very anxious to adjust our difficulties with the Government officials who had this thing in mind. We thought that if we could sit down and talk the things over with them in a free and frank manner as businessmen usually do when they don't see eye to eye, that it should be possible of finding some way of doing business which would seem to us to be feasible, and at the same time meet their desires. We are not litigious; we don't like—

Trial Examiner Norwood: Now, you needn't go into all of that discussion.

The Witness: I am trying to give you considerations, Judge.

Trial Examiner Norwood: Yes, but you needn't explain those.

33903 The Witness: I don't quite know how to answer the question, then.

By Mr. Werle:

Q. What I had in mind was for you to tell us what you had in mind when you suggested it should be conducted under the auspices of the Federal Trade Commission.

A. Well, these proceedings had started at that time, and we were in the hands of our attorneys, and we co ldn't do anything which might result in putting them at a disadvantage in defending these proceedings. Furthermore, we had a rather strong suspicion that this might be—there might be some trick in this proposal, that it might be something designed to entrap us into some admission which would be damaging to this case. That suspicion came

about because of the unusual nature of this proposal and the time at which it was issued.

Q. Did you receive any reply to your letter, Respondents' Exhibit 41, Mr. Porter?

A. We did not.

Q. Did you follow that up in any way by consulting with the Procurement Division?

A. No, we did not. We had no indication that they would be willing to consult with us.

Q. What effort, if any, did you make to find out what your competitors were going to do with this invitation before you made your decision?

33904 A. I made no effort at all, either before or after.

Q. Did you discuss it with any of your competitors?

A. I did not.

Q. Did you know which of your competitors would or would not bid on this proposal?

A. No, I had no knowledge of that at all.

Q. Mr. Porter, I want to call your attention to Commission's Exhibit 1394, which is a further proposal from the Procurement Division, in May of 1938, and ask you if you recall having received that invitation.

A. Yes, I do recall.

Q. And is Commission's Exhibit 1392 a copy of the letter which you wrote in response to that invitation?

A. Yes, this is a letter we wrote in response to this invitation.

Q. In this letter of yours, Commission's Exhibit 1392, there is some reference to the question of bidding f. o. b. mill. Will you tell me whether or not prior to this invitation, and the preceding one, your company had had requests from the Government for quotations f. o. b. mill?

A. I think we had occasional requests of that sort. They did not ordinarily come to my attention.

Q. Were there a great many of them, or were there—

A. No, I think only a few of them; only occasional ones.

Q. Had your company had any occasion to adopt
33905 any ironclad policy with respect to your attitude on quoting the Government f. o. b. mill prior to this time?

A. No, we had no policy against quoting f. o. b. mill;

our policy was only directed to the protection of our dealer customers.

Q. Will you tell me whether or not your statement in this letter as to f. o. b. mill bidding—I believe it is in paragraph 2—was that or was it not consistent with your prior attitude on that subject?

A. Yes, this was consistent with our prior attitude. As a matter of fact, this suggestion was what we had in mind when we wrote our former letter, and then when this subsequent proposal came along we felt the time had come to make our suggestion a little more specific.

Q. Now; as to both of these letters of yours, Mr. Porter, in both of which you propose some sort of a conference with the Procurement Division under the auspices of the Federal Trade Commission, will you tell me whether or not you were sincere in that proposal, or was that just so much window dressing?

33906 A. I certainly was sincere. I felt very strongly on the subject, and had for a long time prior to the date of that letter.

Q. Mr. Porter, has your company ever sold any cement in the State of Mississippi?

A. No, we have not.

Q. Have you ever made an atteinpt to solicit any business in Mississippi?

A. No, we have not.

Q. Have you ever given any consideration to trying to sell cement in the State of Mississippi?

A. No.

33907 Q. Mr. Porter, in your business do you consider every invitation that comes in?

A. No; we get a good many invitations for to bid on deliveries outside of our marketing area. Such invitations are—if such invitations are on the fringe of our marketing area, we would probably consider them, but if they are way off, why, we won't pay any attention to them.

Q. Mr. Porter, how long has your company been a member of The Cement Institute?

A. We joined at the time the N. R. A. was in consideration, which I believe was in 1933.

Q. Had your company been a member of The Cement Institute at any time prior to the action of the N. R. A.?

A. No, we had not.

Q. Commission's Exhibit 136-A to E, Mr. Porter, indi-

cates that Mr. Boeye of the North American Cement Corporation, Frederick A. Boeye, attended an organization meeting of the Institute in August of 1929. Who was Mr. Boeye?

A. Mr. Boeye was vice-president in charge of sales.

Q. Do you know what was the reason for Mr. Boeye's attendance at this organization meeting?

33908 A. Yes.

Q. Tell us, please.

A. Mr. Boeye attended for the purpose of bringing back a report as to what the situation was, what the Institute proposed to do, the reasons for forming it.

33912 Mr. Wooden: Your Honor, if it will help Mr. Werle any we will be willing to stipulate that not only this witness' company, but other Respondent companies joined The Cement Institute, in anticipation of it, because of the program that was initiated under N.R.A.

By Mr. Werle:

Q. Mr. Porter, who in your company finally made the decision that you would join the Institute?

A. I did.

Q. Have you told us yet what your purpose was in joining? If you have, I do not want you to repeat it.

Trial Examiner Norwood: If you have any further purposes than those which you have already stated.

A. No, we joined it solely in anticipation of the N.R.A.

Trial Examiner Norwood: Yes.

By Mr. Werle:

Q. Now, Mr. Porter, the record also shows that you have been a trustee of The Cement Institute. Was it your practice to attend meetings of the board of trustees?

33913 A. Yes, I have attended them pretty regularly.

Q. Will you tell us what were the occasions for meetings of the board of trustees during the period that you were a member of the board?

A. Well, during the N.R.A. period the meetings of the board of trustees were almost entirely in connection with the Code for the cement industry. Following that there was a great deal of discussion as to whether or not the Institute should be abandoned. There were some committees which did not function under the Cement Code which were carried on even during the N.R.A. The reports of those

committees were received, but for the most part the meetings of the board of trustees have been concerned with formal matters; organization.

Q. Did you participate in the preparation of the N.R.A. Code for the Cement Industry?

A. Yes, I did.

Q. Will you tell us, just briefly, what subject matters of the Code you participated in?

A. Well, I was chairman of a committee which prepared the subject to the Government officials, the labor provisions of the Code, and also prepared a lot of supporting data in connection with that. I had no very active part in connection with the other matters of the Code, although I did sit in on the general discussions.

Q. Now, will you tell me whether or not, and to
33914 what extent, the board of trustees of The Cement Institute drafted the Cement Code?

A. Well, the board of trustees, either by itself, or through committees, and with the aid of Government officials, drafted the provisions of the Code; but those drafts were all taken back to meetings—to industry meetings, at which they were thoroughly discussed, and the board of trustees were given instructions as to how to proceed from there on.

Q. Now, will you tell us what connection the board of trustees had with carrying out the N.R.A. Code?

A. They had no part in the actual carrying it out. That was in the hands of a code authority.

Q. Were you a member of the Code Authority?

A. No.

Q. How long did you remain a member of the board of trustees, Mr. Porter?

A. I have been a member of the board of trustees continuously up until the present date.

Q. And is that since 1933?

A. Since 1933.

Q. Will you tell me whether or not the board of trustees of the Institute concerned itself with the subject of cement prices at any time during your membership on the board?

A. No, it has not, unless the discussions of certain provisions of the N.R.A. Code might be so construed.

33915 Q. Now, Commission's Exhibit 832-G, Mr. Porter, indicates that it was sent to you.

Mr. MacIntyre: What is the number?

Mr. Werle: 832-G.

By Mr. Werle:

Q. Will you look at that and tell me whether you recall having received it (handing document to witness)?

A. I have no recollection of having received it; but I presume that I did.

Q. Well, now, as to that, was it any part of the duties of the board of trustees to police the sales policies and practices of members of the Institute?

A. It was not.

Q. Was it any part of the activity of the board of trustees, or of the individual members of the board, to your knowledge, to carry on liaison work with dealers or dealers' associations?

A. It was not.

Q. Do you know Mr. Harlow S. Chaffee?

A. No, I never met him.

Q. Mr. Porter, according to Commission's Exhibit 950-B to Y, and I think perhaps some others, you were
33916 shown to have been a member of the committee on public relations of The Cement Institute; is that correct?

A. Yes, that is correct.

Q. Can you tell us for how long a period that committee was in existence or in operation?

A. I can't give the exact time, but I think it functioned for about a year and might have been—it might have been a somewhat longer period before it was formally dropped.

Q. Were you familiar with the reasons and the circumstances surrounding the appointment of such a committee?

A. Yes.

Q. Will you tell us briefly about that, please?

A. Well, at about that time there had been a number of very vicious attacks on the cement industry by Government officials, and many of us connected with the cement industry felt that they were entirely unjustified, that they were based on total misconception of what we were doing, the reasons for it, and we felt that we were entitled to tell our side of the story and attempt to get a better understanding of our industry.

Q. In Commission's Exhibit 950-F and G, which is ap-

parently a document that was prepared by your committee; there is also a reference to certain misconceptions regarding your practices. Will you tell us what were the misconceptions that your committee had in mind?

33917 A. Yes. There was a belief in some quarters that we were a monopoly all acting together; that the fact that prices were uniform at any given time and place in a good many instances was prima facie evidence of collusion and fixing those prices. There was a general misconception as to the profits of the cement industry, a general belief in certain quarters that the industry was making excessive profits. I think that covers the principal misconceptions.

Q. Without spinning this out, Mr. Porter, will you tell us in a few words just what your committee did or what it attempted to do to remove these misconceptions?

A. Well, we discussed many methods of procedure and developed a great deal of difference of opinion among the members of the committee. However, there were three things that either were done or grew out of the activities of the committee, and which I recall. First was some advertising which was handled by the chairman of the committee; second was the Burns and Clark investigation of our marketing practices, which was not handled by the public relations committee, but which grew out of the discussions in the committee; and, third, certain contacts that were made with certain Government officials which also were not formally a part of the committee activities but which grew out of the committee discussions. I have in mind particularly a contact made by Mr. John Trainor with a Mr. Ferguson, who was then a Federal Trade Commissioner.

33918 Q. Now, you referred to some advertising. Will you tell me whether or not you had in mind Commission's Exhibit 916-J, K, and L, in that connection?

A. Yes, this is what I had in mind.

Q. Did your committee confer on those advertisements, Mr. Porter?

A. No; it is my recollection that that advertising was handled entirely by the chairman of the committee and some advertising agency. I am quite sure that I never saw those advertisements until they appeared in print.

Q. I want to show you Commission's Exhibit 561, Mr. Porter, which purports to be a printed pamphlet of articles of association, and a compendium of established terms and marketing methods. Do you recall that compendium?

A. Yes, I have some recollection of it.

Q. Were you a member of the board of trustees at the time that was released?

A. Yes, I was.

Q. Did you take any part in the preparation of that document?

A. I did not.

Q. Did your company receive a copy or copies of it?

A. Well, I presume that we did. I don't have a specific recollection of it.

Q. Will you tell us in what way it was used by your company?

A. It was not used at all, just went into the files.

Q. Did The North American Cement Corporation
33919 make any change in its practices or policies either as a result of that compendium or at the time that that compendium was distributed?

A. No; I am quite sure we made no changes in our policies or practices as a result of this publication.

Q. Mr. Porter, will you tell us to what extent, if any, the Cement Institute or the activities of The Cement Institute have determined or affected any of the marketing practices or price policies of the North American Cement Corporation?

A. The Cement Institute has had nothing whatever to do with our marketing practices or policies except in so far as they were affected by the N.R.A. Code.

Q. With respect to the practices which were provided for in the N.R.A. Code, has your company continued until the present time to follow some or all of those practices?

33920 A. I think we have followed some of them but not all.

Q. Without going into any detail on it, will you tell us whether or not the practices set forth in the Code which you say you have followed since then have been carried on or followed as the result of any understanding with or agreement with any other companies that you would do that?

A. Not at all.

Q. Just in a word, how are the sales and marketing policies and practices of The North American Cement Corporation determined?

A. Well, many of them are determined by necessities of competition. In other words, if some competitor adopts a policy which is even slightly to the advantage of our customers, we must necessarily follow that same policy or one more liberal, otherwise we would not—we would lose business. There have been some policies that we have adopted that perhaps haven't come in that class. Generally speaking, in those cases we have observed that the policies were adopted by others, that they worked well, and we have voluntarily adopted them.

Q. Now, as to the meetings of the trustees of the Institute that you have attended, have you also attended meetings of the members of the Institute and members of districts 1 and 2 of The Cement Institute?

A. Yes, I have attended a number of such meetings.

Q. Have you at any time at any of these meetings,
33921 including meetings of the board of trustees, with the exception of this period when you were preparing the Code, had discussions as to future action with reference to the price of cement?

A. Certainly not.

Q. Mr. Porter, as to that, have you ever had any such discussions as that with respect to future action in any formal or informal meetings that may have occurred in the hotels or other places where such meetings were held?

A. I have not.

Q. Have you at any time, Mr. Porter, had any understanding or agreement with any of your competitors as to the sales policies or the pricing policies or future prices or policies which would be observed by your company?

33922 Mr. Werle: Will you read the question, please?

(Question read.)

A. I have not.

Q. Mr. Porter, Commission's Exhibit 969-4-K refers to to operation by your company of silos at Washington, D. C. Do you still operate those silos?

A. Yes.

33929 Q. Well, I will repeat: The question that I would
33930 like you to answer: What were the circumstances under which you established your silos in Washington, D. C.?

A. Well, two of our competitors had established silos and delivered directly to the truck of consumers. That gave them an advantage over us. It was in effect a reduction of price, or, at least, it was a reduction in cost to the consumer, and we found we were losing business and we were forced to adopt the same method in order to hold our customers.

Q. Did all of your competitors erect silos at Washington?

A. Not all of them. Some of them rented silos; some of them—they made various arrangements.

Q. Now, have you obtained more business in the District of Columbia since your silo was put in than you had been obtaining prior to that time?

A. Our volume has gone up and down in accordance with business conditions. I don't think that we have obtained more business, but we have held the customers that we had at that time.

Q. Did you have any other supplementary storage space at any other location?

A. No, we have no warehouses in any other marketing areas, other than our plants.

Q. Is there any particular condition in Washington, in your experience, that makes that a more desirable place to have such a supplementary plant than any other market?

33931 A. Yes, we have the competition here in Washington and we haven't had it at other points.

By Mr. Werle:

Q. When you say "we have the competition," what do you mean by that?

A. The competition of competitors' warehouses.

Q. I see.

Now, have you found that it is advantageous to your company, or it is not advantageous for your company to distribute through this silo at Washington.

A. Well, it is very disadvantageous from the standpoint of costs. It is an expensive operation; it is advantageous from the standpoint of volume, and when we went into it we calculated that the loss due to falling off in volume, if.

we did not put it in, would be greater than the loss due to increase in cost if we did put it in. It was a question of choice between two evils.

Q. Have you considered establishing storage facilities such as that at other points?

A. Yes, we have given some consideration to
33932 that in the past.

Q. At what points?

A. Well, at one time we talked about New York City, and another time we talked about Baltimore.

Q. And—

A. When I say "we," I mean the officers of our company.

Q. Do I understand that the decision was not to erect any similar storage facilities elsewhere?

A. Yes; we found on analysis that it would be expensive in first cost, that there would be a very considerable expense in operation, and while we might have gotten temporarily some advantage in volume, it was evident from what happened in Washington that sooner or later our competitors would meet the situation, and we would be no better off than we were before—in fact, we would be worse off than we were before.

Q. How is delivery made from your silo, by railroad, or truck—

A. By truck.

Q. Now, your company, having discontinued in trucking in 1932 at your cement mills, can you explain the reason why you have carried on truck delivery at Washington and yet have abandoned it at your mills?

A. Well, the situation is entirely different with this warehouse at Washington, which was laid out for the
33933 specific purpose of handling trucks. We are able to handle them much more economically than we can at our plant, and the other factor involved is that the dealer customers, and our customers, in and around Washington, want trucking, and the customers around our plants did not want it for the most part.

Q. Now, coming to another subject, Mr. Porter: On the occasion of a price advance by your company, do you receive the benefit, full benefit, of the new higher prices immediately?

A. No, we give our customers a certain length of time in which to place orders at the old price, both orders for

current delivery and for future protection on specific jobs. Then, of course, we continue to supply contracts in existence at that time at the old price until such contracts have been completely filled.

The witness identified Resp. Ex. 2403 A, B, C, and
33934 D as an analysis of how much cement North American would have to ship at the old price, following a price advance. It is dated December, 1933. Mr. W. E. Hannan, Jr., at that time was an assistant in the New York sales office. The document was prepared at the time it is dated. It came to him in the regular course of business.

33934 (RESP. EXS. 2403-A, 2403-B, 2403-C, 2403-D was
33935 offered and received in evidence.)

By Mr. Werle:

Q. Now, Mr. Porter, can you tell me whether or not this memorandum explaining this question of prices represents a typical situation, or is that unusual?

A. No, this is the typical situation that applies after a price advance.

Q. And this tabulation which appears at the bottom of Respondents' Exhibit 2403-D, can you just explain that for us so we understand what it is? And you needn't go into the contents so much, just giving us an idea of what it means so we can understand it.

A. This shows the percentage of our total contracts on hand which would have to be shipped out at the old or low price on a particular date.

Q. Mr. Porter, Commission's Exhibit 2344-A to F.

Q. This exhibit, Mr. Porter, indicates that you
33936 were present at a luncheon with Dr. Morgan in February of 1934.

Do you recall having attended such a luncheon?

A. I do.

Q. Did the North American Cement Corporation bid on any T.V.A. work?

A. We did not.

Q. Was any of the T.V.A. work within the normal marketing area of your company?

A. It was not.

Q. Did you ever have any thought or intention of bidding on any T.V.A. work?

A. We never had any idea of it.

Q. Then, will you describe for us the circumstances under which you attended this luncheon that is referred to.

A. Mr. John Trainor called me up, said that he was arranging this luncheon at the request of certain eastern manufacturers who were interested in T.V.A., and he asked if I would be present. He gave his reason the fact that I had been a college professor for five years, and he said he thought that I might have some points of contact with Dr. Morgan and it might create a good impression, or something to that effect. I had no interest in the matter whatever, but I was interested in Dr. Morgan; he was very much in the public eye; I rather admired him, and I was glad to accept an opportunity to meet him.

Q. You were stated by Dr. Morgan—you are de-
33937 scribed by Dr. Morgan as "Mr. Porter, a director of the Institute."

Q. Mr. Porter, when you attended that luncheon, did you represent The Cement Institute?

33938 A. I did not. I was invited as an individual and not as a trustee. I had no—I had been given no authority by the Institute to represent them at that luncheon.

Q. Did you make any report to the Institute or to the board of trustees about this luncheon?

A. I did not.

33939 Q. Tell me this, Mr. Porter. Were you representing the North American Cement Corporation at this luncheon?

A. No, I went purely in an individual capacity.

Q. All right.

Now, to the best of your recollection, Mr. Porter, would you tell us what transpired at this luncheon?

A. The early part of the luncheon was taken up with a discussion of general subjects. Later on they got to the cement industry and the T. V. A. requirements. It is my recollection that Dr. Morgan expounded at some length his views as to the relationship between Government and business; that he stated that in his view it was to the public interest for the Government to buy from private companies rather than to build their own plant, provided he could buy with the assurance that he was not being—the Government
was getting a square deal and was not paying an ex-
33940 cessive price. The talk then turned on how it could be determined as to whether a given price was fair,

and Dr. Morgan felt that costs were the criterion that should be used, and I recall that Mr. Blaine Smith stated that he would be quite willing to turn over all of his books and records to the T. V. A. and allow them to check the figures on costs and the prices quoted. There was some further discussion as to how that should be gone about, the agency which should handle it, the analysis of cost, and so forth. I think that is about all I remember of the discussion.

33943 Q. Mr. Porter, before we recessed for lunch we were discussing Commission's Exhibit 344, and you will recall that related to this luncheon that you attended at which Dr. Morgan was present.

Do you recall any discussion at that meeting of the cement industry having endeavored to bring about stabilization through certain control or controls?

A. No, I don't remember any such discussion.

33946 Q. Well, Mr. Porter, can you recall whether or not there was anything discussed at this luncheon

33947 about uncontrolled price competition?

A. No, I am pretty sure there wasn't anything of that sort discussed.

Q. Was there anything discussed at that luncheon, to the best of your recollection, as to whether or not the cement industry had found the matter of stabilizing competition a problem, or was there any discussion of that nature that you recall?

A. If you are referring to Mr. Trainor's theories, I am quite sure that that did not come up at the meeting.

Q. Well, as to that subject matter, Mr. Porter, what, to your knowledge, has the cement industry done to bring about control of price competition in order to stabilize the industry?

A. I don't know of anything they have done. I am quite sure that they haven't done anything.

Q. Do you recall whether or not there was any discussion at this luncheon with respect to the appearance of collusion and conspiracy in the cement industry?

32948 A. I don't remember any such discussion.

By Mr. Werle:

Q. I believe you did say, however, that there was some discussion about T. V. A. negotiations or negotiating in connection with a fair price; is that correct?

A. Yes, that is correct.

Q. What was that discussion?

A. Well, Dr. Morgan felt that a fair price should be based on cost of production, and thereafter the discussion turned on how some accurate figures, reliable figures for cost of production could be gotten.

Q. Do you recall who brought the matter up?

A. Well, I think that Dr. Morgan brought the matter up first.

Q. Did you express your approval of the suggestion that T. V. A. get together on this matter with the bidders in the Tennessee Valley area?

A. Why, I don't think so; certainly not in any formal way. I wasn't concerned in the matter. It would have been presumptions for me to have done that, but I might have stated that I thought they were doing the sensible thing, or something of that sort.

Q. As a result of the discussion at that luncheon, 33949 did you understand that such negotiations with T. V. A. would be carried on by the cement industry or by The Cement Institute, or by whom did you understand they would be carried on?

A. It was my understanding they were to be carried on between the T. V. A. and the companies which normally shipped into that area.

Q. Now, subsequent to this luncheon, did you take any further action in connection with negotiations with T. V. A.?

A. I did not.

Q. Were you kept advised of the progress of the negotiations?

A. No, I was not. I think as a matter of interest I may have made some inquiries now and again as to how they were getting along, but I had no definite information otherwise.

Q. So far as you were aware, did you as a trustee have any duties or obligations to perform in connection with these negotiations?

A. I did not.

Q. Did you ever meet Dr. Morgan again?

A. Never have.

Q. Did you participate in any way by vote or expression of approval or otherwise as to this final price for T. V. A. which was proposed by Dr. Morgan?

A. I did not.

Q. Was that question ever brought up at any meeting

or group meeting or Institute meeting of any kind
33950 that you were present at?

A. No, no; I am sure it was not.

Q. Mr. Porter, does The North American Cement Corporation furnish any services to its customers other than the service of getting the cement to the destination at the time and place it is desired?

A. Yes, we furnish a good many services to our customers.

Q. What is the character of the service which you have in mind?

Mr. MacIntyre: I object; it is irrelevant and immaterial unless those services are reflected in prices quoted. The price competition is the thing that we are involved in here, and not a matter of competition in giving calendars, pencils, and various little pieces of advertising matter or other services of like character, or otherwise, to various customers.

33951 By Mr. Werle:

Q. Do you remember the question, Mr. Porter?

A. Yes.

Well, one of the principal services that we furnish is the technical service of engineers in respect to the use of cement.

33954 Q. Mr. Porter, without going into these services at the moment, will you tell us whether or not you have found that they are worth something in dollars and cents to the customer?

A. I think to many of our customers they are worth a great deal and are a very important consideration of the price he pays us for our material.

Trial Examiner Norwood: These services that you are speaking of, are services that are rendered by other competitors, are they?

The Witness: They are rendered by some other
33955 competitors, Judge.

Trial Examiner Norwood: Yes.

The Witness: But not by all of them.

Trial Examiner Norwood: I see.

By Mr. Werle:

Q. Well, let me ask you this, Mr. Porter: Are the services that your company renders of the character that we are discussing identical with the services rendered by such competitors as do offer some service of that kind?

A. No, because the service rendered varies in each individual case.

Trial Examiner Norwood: They are such services that your competitors would not feel obligated to meet?

The Witness: Well, policy varies among the various companies, Judge; some of them—

Trial Examiner Norwood: Well—

The Witness: —work along the same general lines that we do, and some do not.

Trial Examiner Norwood: If service is a substantial advantage, wouldn't they be required to meet it in order to get the business?

The Witness: Well, these services only refer to particular classes of business.

Trial Examiner Norwood: Yes.

The Witness: They are only of value to certain
33956 particular customers.

33963 By Mr. Werle:

Q. Well, Mr. Porter, do you recall certain shipments made by your company for other companies during the years 1936, 1937, and 1938?

A. I do.

Q. Can you tell us what the circumstances were under which those shipments were made?

A. Those shipments fell into three categories: First, one of our competitors had their plant closed down by labor trouble during that period, and we helped them out by shipping some cement for them. In the second place, I think a large part of our shipments for other companies during those three years consisted of high early strength cement, which was not at that time made by several companies, and they had orders to fill; they turned them over to us, or they bought the cement from us. The third category was in cases where certain competitors had
33964 orders for New York State highway cement, and for one reason or another they were unable to meet their obligations and bought cement from us to make shipments on those contracts.

33965 A. It takes a 28-day test, and it takes the State laboratory considerably longer than 28 days to collect their samples, make their tests, and report them to the manufacturer.

By Mr. Werle:

Q. Were there any other reasons, Mr. Porter, during

this period of 1936, 1937, and 1938, that you made shipments for the account of other companies? Before you answer that question, will you tell me whether or not that is a correct statement of the transaction? Were these shipments made for the account of other companies?

A. I am not quite sure what that term means. What we actually did was to sell to other companies.

Q. Well, now, as to that, were there any other reasons than the ones you have told us about for such shipments by your company during this period?

A. No. The three reasons that I have given covered all the shipments that we made for other companies during that time.

33966 The witness identified Resp. Ex. 2404 as a chart which North American has kept up over a long period of years to show the percentage of its production to capacity in comparison with the percentage of production to capacity of districts 1 and 2. He thinks this chart was first started in along about 1929 or 1930, and it has been kept up yearly ever since. The witness laid out the chart originally and showed North American's statistician how to prepare it, and he has kept it up since then. Those dotted lines were drawn by calculating certain points from Bureau of Mines' yearly reports. North American took the Bureau of Mines' published figures for capacity of the district and divided that into their published figure for the production of the district. North American used a capacity figure of 1,750,000 barrels for its Security mill.

33967 It used 1,000,000 barrels for Howes Cave, 1,400,000 barrels for Catskill. Figures were obtained from the running records, current records of the company. The points on those solid lines were obtained by dividing the production by the capacity figures that he has just mentioned.

33967 Mr. Werle: I offer that in evidence (handing the exhibit to Commission's Counsel).

Examination on Voir Dire

By Mr. MacIntyre:

33969 Q. Isn't it a fact, Mr. Porter, you would have to check those original invoices of shipments and your original records on inventories in order to determine your production just as you had done originally?

A. Well, I didn't do it that way, Mr. MacIntyre.

Q. Well, isn't that what we understood you to say, that it had been done by someone in your company?

A. Oh, yes, that is done as a matter of daily
33970 routine by the clerks of our plants at each of our plants.

Q. That is a matter of keeping it computed?

A. That is right.

Q. Monthly, or otherwise, or the like?

A. Tabulations of the shipments are kept up daily at our plants. At the end of each month an engineer goes out and estimates the quantity of cement and clinker on hand in the stock houses, and then the clerk sits down and makes up this statement of production and shipments and sends it in to the accounting office.

Q. By each month adding together the total shipments shown on invoices?

A. That is right.

Q. How many invoices did your company accumulate over this period shown by this graph in 1925 to 1938?

A. Oh, I couldn't tell you as to that. It must have been a great many thousands.

Q. It would run into 500,000 or more, wouldn't it?

A. I wouldn't be surprised.

Mr. Werle: May I make an objection at this point, please? This isn't a paper that this witness has made up for this proceeding. This is a record of this company that he keeps and these questions are apparently all calculated to show that it is based on some computation. Well, what if it is? The fact of the matter is, it is a record
33971 kept in the regular course of business.

Trial Examiner Norwood: I shall overrule Counsel's objection because we should like to know—I should like to know before admitting this in evidence about the basic data, whether or not it is available to the other side. That is a condition of the receipt of all of these now. If the Counsel will permit him to go ahead and bring this out, why, we will proceed.

Go ahead.

33973 *Direct Examination by Mr. Werle (Continued).*

Q. Mr. Porter, could you vouch for the accuracy of that tabulation?

A. Yes, I can vouch for it.

33974 Trial Examiner Norwood: Any objection to it (referring to Respondents' Exhibit 2404, for identification)?

Mr. MacIntyre: Yes.

Trial Examiner Norwood: State it.

Mr. MacIntyre: We object to it as irrelevant and immaterial, and also on the basis of its incompetency, and the last objection goes to the point that it is a prepared and calculated statement which cannot, under the circumstances, and as a practical matter, be checked in an effort to determine the truth and accuracy of such a computation and calculation.

Trial Examiner Norwood: I should like to find out—I should like to be shown its relevancy.

Mr. Werle: Well, I think—the purpose of offering it is to show the relation of the shipments, the production of this company, and its shipments in connection with the district in which it is located—and I think that it bears on this question of whether or not there has been some allocation of production or allocation of percentage, so far as this company is concerned.

33975 *Examination on Voir Dire by Mr. MacIntyre.*

Q. Mr. Porter, if it is found impracticable on the part of the Federal Trade Commission to make a check of the original records of your company for the purpose of determining the accuracy of this Respondents' Exhibit 2404, do you now by a statement on the record release through an agreement with the Bureau of Mines your production figures over this period which your company has sent to the Bureau of Mines?

Mr. Werle: Just a moment—do not answer that question.

Mr. Capen: Wait a moment.

Mr. Werle: I object to this question. It hasn't anything to do with this inquiry and it is improper. Counsel wants to know if this company is going to release anything.

They know it is proper to direct their inquiry to counsel and not to the witness.

Trial Examiner Norwood: Well, I will direct the inquiry to Counsel.

Are those figures available at the Bureau of Mines?

Mr. Werle: I do not know whether they are or not, but I assume the figures are there, but as to whether or not Commission's counsel shall see them, my position is that, at the moment, I do not represent this company.

33976 Trial Examiner Norwood: Do you release them for the inspection of the Counsel for the Government?

Mr. Capen: I do not feel that we should do that, Your Honor.

Trial Examiner Norwood: All right. The objection is sustained.

By Mr. Werle:

Q. What figures do you furnish to the Bureau of Mines, Mr. Porter?

A. We furnish figures for production and shipments.

Q. And the figures on production that are furnished to the Bureau of Mines—

A. (Interposing.) Pardon me. And stocks on hand.

Q. The figures on production that you furnish to the Bureau of Mines, are they also made up in the same way that this material that Mr. MacIntyre was inquiring about is made?

A. Exactly.

Q. Are the figures you furnish to the Bureau of Mines any more reliable than the figures appearing on this chart (referring to Respondents' Exhibit 2404, for identification)?

A. They would be the same.

Mr. Werle: Your Honor, I re-offer the document.

33977 Trial Examiner Norwood: Well, the ruling is the same, unless there is some data made available. We have been receiving these tabulations where the supporting data was available to the other side. I see no reason for making any exception here in favor of this paper, or what appears to me to be of doubtful relevancy.

Mr. Werle: Your Honor means that we have been doing that since the Respondents have started putting in their case. Prior to that there wasn't any such ruling, and

furthermore, there isn't any basic data. The only basic data would be for somebody—we would have to bring in every man down the line through this company who had had anything whatever to do with adding figures for the company.

Trial Examiner Norwood: Yes.

Mr. Werle: And that is exactly what the statute is for.

Trial Examiner Norwood: I think that you made a misstatement there when you spoke as to any change of rulings in favor of the Respondent or against the Respondent in favor of the Government.

Mr. Werle: Well, I—

Trial Examiner Norwood: The implication is resented and I will ask Counsel not to repeat that line of argument.

I will ask all Counsel not to repeat it. It does them
33978 no good.

Mr. Werle: Well, I went over—

Mr. Brick: It depends on the circumstances, Your Honor please. I think that we are entitled to—

Trial Examiner Norwood (Interposing): The record shows what the rulings are, and you may call attention to any inconsistencies in my rulings when you get before the court.

Mr. Brick: Well, I think Your Honor should be advised of our position, too.

Trial Examiner Norwood: I am fully advised on that position.

Mr. Brick: Otherwise I am sure that Government Counsel would take the position, if we did not advise you here, later, that we should not be heard to complain later on—

Trial Examiner Norwood (Interposing): I am sure they would not.

Mr. Brick: —and now—

(The Trial Examiner brings down his gavel.)

Mr. Brick: Pardon me.

Mr. Wooden: Your Honor—

Trial Examiner Norwood: Mr. Wooden.

Mr. Wooden: I want to point out that while we were putting in our evidence the rule was that tabulations,
33979 and graphs, and charts, and so forth, should be accompanied by the underlying basic data.

Trial Examiner Norwood: That is the ruling we have had since the beginning of the case.

Mr. Brick (Interposing): That is not so—

Trial Examiner Norwood: Perhaps this Counsel today present were not here at the time.

Mr. Brick: If I may be permitted, I would like to disagree with Your Honor, and be permitted to point out why the practice of bringing in supporting data with relation to tabulations offered by the Government developed out of an entirely different situation. In those particular instances the Government put on the stand various bureau employees who had no knowledge of the tabulations and documents which they were identifying. All of their testimony was hearsay.

Trial Examiner Norwood: Now, I hope that Counsel won't insist on discussing this any further. The ruling has been made, and it is my ruling that the discussion on it is closed. It is very clear to me as to just what we did, and what I did pursuant to the insistent objections of the Respondents, and we had that rule from the beginning of this case, that those matters were not received except where the supporting data was made available for the other side.

33980 Mr. Brick: Well, I disagree with you—

Trial Examiner Norwood: Yes, I understand that.

Mr. Brick: —in substance.

(The Trial Examiner brings down the gavel.)

Trial Examiner Norwood: I understand that. I understand.

Mr. Brick: And I would like to explain to Your Honor—

Trial Examiner Norwood: I do not wish any more explanations. The discussion is closed on that.

Proceed with the examination.

Mr. Capen: Your Honor, may I ask you one question, sir, as to future procedure?

Trial Examiner Norwood: Yes.

Mr. Capen: If we were to furnish to Your Honor a statement signed by the treasurer of the company, listing the production of the company for each of the years 1925 to 1938, inclusive, after Mr. Porter leaves the stand, would that cause Your Honor to reconsider your ruling on this chart?

Mr. MacIntyre: Your Honor, what is the mystery and the desire for the secrecy surrounding the report that the treasurer of the company has heretofore made, or other officers of the company have heretofore made month by

month, year by year, to the Bureau of Mines; with-
33981 out any thought of any investigation by the Federal Trade Commission or the Department of Justice?

Mr. Brick: If we thought you would use the information fairly we might not be disinclined to let you have it.

Mr. MacIntyre: If it is, as you say, exactly the same as what you are attempting to put in through Respondents' Exhibit 2404, we could not use it any differently than you are using it on that sheet of paper in this case.

Trial Examiner Norwood: Now, as far as the Counsel's question there, I do not think that the production of any signed statement from the secretary to me would make any difference in my ruling whatsoever. If you produce these figures here in the proper way, in the lawful way, they will be received.

I shall rule on that when it comes up. It might come in by agreement with the other Counsel. I have no objection to that. But I have already made myself very clear on this, that this tabulation shall not go in in the absence of the availability of the supporting data to the Counsel on the other side.

Mr. Werle: Well, we might be able to come to some—

Trial Examiner Norwood: We have followed that practice all the way through, and we are going to
33982 follow it right along.

Mr. Werle: Your Honor please, we might be able to come to some arrangement on that.

Trial Examiner Norwood: Yes.

Mr. Werle: If Government Counsel will tell us what they mean by the basic data, first—what they mean by basic data that they want to see, and, secondly, demonstrate that what they want to see is something that is any more reliable, or any more different from what this is.

Now, there has been a lot of general talk about basic data, and Your Honor has said if we would produce the proper underlying figures—well, what underlying figures are there that are needed here? That is what I would like to know, and then we can consider a definite request for some definite figures or papers.

Mr. MacIntyre: Your Honor please, I made a definite request on the record.

Mr. Werle: What?

Mr. MacIntyre: To the witness, and if they meet that

request, that is all that we will ask them to meet with respect to making available to us basic data. We will not ask for any more to check this document. I think that is very short and clear,

Mr. Werle: That is a definite request.

33983 Trial Examiner Norwood: Yes.

Mr. Werle: And I am grateful to have it.

Now, as to that, the data that was furnished to the Bureau of Mines, this witness has said that this was not the basic data upon which this was made up. That is another tabulation. That is sent to the Bureau of Mines. Both of them are apparently made on the same underlying data, whatever they might be.

Trial Examiner Norwood: Yes.

Mr. Werle: Now, the Bureau of Mines' statement of this company was not any basic data for this paper, not by the wildest stretch of the imagination. As to that, we refuse that, I say.

Trial Examiner Norwood: Do I understand that you are not refusing to furnish any data that is in your power to show?

I will not change this ruling in any manner whatsoever, and I hope Counsel will consider the discussion closed on it.

Mr. Werle: I would like to be able to comply—

Trial Examiner Norwood: Yes.

Mr. Werle: —at least consider furnishing them what they want, but I cannot consider it when I do not know what they want.

Trial Examiner Norwood: They have told you

33984 what it is.

Go ahead.

By Mr. Werle:

Q. Mr. Porter, coming to just another subject for the moment: Does your company have any occasion to ship cement to the United States Government in territory where land-grant rates are available to the Government?

A. No, we do not, although—I don't know of any cases where we have. There might have been some case in the past that I don't know about; ordinarily, we certainly do not.

Q. Is your company a member of the Portland Cement Association?

A. We are.

Q. Have you been a director of the Portland Cement Association?

A. I have for quite a number of years.

Q. For how long?

A. Well, I think it has been since 1931.

Q. Do you attend meetings of the board of directors of the Portland Cement Association?

A. I have attended a very large majority of such meetings.

Q. You also attend meetings of the association members.

A. Yes.

Q. That is, a meeting of the Association—I have in mind.

A. Yes, I have, practically all, or almost all of them.

33985 Q. Now, to what extent—Well, I will withdraw that.

Will you tell us, Mr. Porter, what the activities of the Portland Cement Association are?

A. The Association operates two research laboratories in which they investigate the composition and properties of cement and the uses of cement in the manufacture of concrete, and various concrete products; they support a small technical bureau which investigates problems of manufacture of cement; they support an accident prevention bureau which has to do with the prevention of accidents in the mills of member companies. Their principal activity is that of promoting the uses of cement through technical services and investigations made to and in behalf of users of cement.

33986 There are some subsidiary—there may be some added minor activities, but those are the principal ones.

Q. To what extent, Mr. Porter, if at all, has the question of cement prices been discussed or brought up at Portland Cement Association meetings, or meetings of the board of directors of the Portland Cement Association at which you were present?

A. I have never known it to be discussed at all at such meetings.

(The foregoing testimony beginning with "Will you tell us, Mr. Porter, what the" was adopted by Georgia, Oregon, Giant, Utah Standard and Vulcanite.)

33988 Q. Now, Commission's Exhibit 2-C indicates that Mr. Jansen Noyes is a member of the board of directors of The North American Cement Corporation. Is that correct, Mr. Porter?

A. Yes, it is.

Q. That same exhibit also shows Mr. Jansen Noyes to be a director of the Penn-Dixie Company. Is that also true, to your knowledge?

A. I believe that—I understand that he is.

Q. Now, is there a Mr. Louis H. Porter who was
33989 a member of the board of directors of the North American Cement Corporation?

A. No.

Q. Are you a director of the Alpha Portland Cement Company?

A. I am not.

Q. Are there any directors or officers of the North American Cement Corporation other than Mr. Noyes who are directors or officers of any other cement manufacturing company?

A. No.

Q. Is there any interlocking relationship or affiliation of any kind between The North American Cement Corporation and any other cement manufacturing company?

A. No, there is not.

33997 Q. Now, coming to another subject, Mr. Porter. There have been refetences in the record from time to time a North American Company which was a licensor under a license agreement in the early 1900's. Do you know whether that North American Company is still in existence?

A. No, that passed out of existence many years ago.

Q. And was that company at all absorbed by or has it become a part of The North American Cement Corporation?

A. No, it had nothing whatever to do with the North American Cement Corporation.

33999 Q. Mr. Porter, I referred yesterday to your practice, the practice of your company with respect to notifying your competitors about changes in your prices and you explained what your practice was. In connection with that, I asked you: "Do you know whether or not there was any deviation from that practice in connection with these changes in prices around Baltimore?"

Now, did you understand me to refer there merely to the subsequent changes in your Baltimore prices, or
34990 did you understand me to include the initial change that you made in those Baltimore prices?

A. I understood that to refer to all of the changes, including the original price change as well as the subsequent ones.

Q. Yes. Now, then, will you tell us, Mr. Porter, during the 25 years that you have been associated with the Security Cement & Lime Company, and The North American Cement Corporation, have those companies sold their cement at delivered prices or f.o.b. mill prices?

A. Almost entirely at delivered prices. There have been only a few instances of f.o.b. mill prices.

Q. Will you tell us the reasons why those companies have made the greater part of their sales at delivered prices?

A. Well, our customers, practically all of them, want to know their cost, the cost of our product at destination. They want to be able to compare the cost of our product with the cost of the product of our competitors, and they are not usually equipped to calculate those transportation costs themselves. Consequently, we find it necessary in order to compete effectively to give them what they want and to make and to quote delivered prices.

Q. When you say "to compete effectively," will you tell me how that is involved?

34991 A. Well, if our competitors quote in the way the customer wants him to do, and we don't quote, we would be, naturally, put at a disadvantage.

By Mr. Werle:

Q. Now, you said, I think, your customers, almost all of them, or something of that character? Whom were you referring to? What types of customers were you referring to?

A. All types.

Q. Mr. Porter, you have described, I believe, for us, the extent to which you give consideration to basing
34992 points in connection with your prices. Will you tell us, as to that, do you use them as the result of any arrangement of understanding or agreement with any other cement companies?

A. We do not.

Q. Has there at any time during the period of your

association with The North American Cement Corporation; has there been any time that the future action of your company with respect to prices or the methods which you might use to arrive at your prices been restrained or limited in any way through any understanding or agreement of any kind or character with any organization outside of The North American Cement Corporation?

A. There has not.

Q. Would you, Mr. Porter, know whether your company had been restrained in that respect?

A. I think I certainly would.

Cross-Examination by Mr. MacIntyre.

Q. Mr. Porter, in your answers to the last two questions, do we understand that you were speaking for not only yourself as to these agreements but for your company and all of its responsible officials, employees, and agents?

A. I am.

Q. In other words, it is your testimony that none
34003 of your company's employees, agents, or officials, including yourself, have entered into any agreements, had any understanding, or had communications and conversations with competitors of your company on sales policies and practices and prices and establishment of basing points, and so on?

A. I don't think I said just that, Mr. MacIntyre. Your question involves several points there, and I think some of them might go beyond what I have stated.

By Mr. MacIntyre:

Q. Well, will you state whether or not that is a fact as stated?

Mr. Werle: I object to that.

A. What?

Trial Examiner Norwood: Wait a minute.

By Mr. MacIntyre:

Q. That is, the factual matters set forth in the question.

Trial Examiner Norwood: Well, the witness has said that he—

Did you say you didn't understand the question?

The Witness: I said the question is in several
34004 parts.

Trial Examiner Norwood: Well, now, read that.

(The record was read.)

Trial Examiner Norwood: Will you state whether or not that is the substance of your testimony?

A. We have a great many employees, and only a few of them are responsible executives who have any authority to commit the company in any way. I think it is rather probable that some of our employees at various times have had conversations with representatives of competitors. Some of them may have had conversations on the subject of price policies or methods of sale, or something of that sort. For all I know, they may have done so, but I am certain that none of our responsible employees—that none of our employees have at any time committed the company in any way to any understanding or agreement on those subjects.

By Mr. MacIntyre:

Q. Do you say that none of your officers, directors, have had communications and discussions with your competitors, or competitors of your company, on those subjects?

A. I think some of our officers have probably at times had discussions with competitors on matters of price policy, and so forth, discounts, and dealers, and various things of that sort; but I again say that I am certain that none of them have entered into any agreement or
34005 understanding or commitment in connection with such discussions.

Q. Can you describe the discussions that have taken place in that respect between the officials of your company and the representatives of its competitors?

A. No, I cannot.

Q. How can you appraise them in saying that they have not amounted to an understanding?

A. Because we have a very definite company policy which all responsible officials are thoroughly familiar with, and I am sure that they would none of them violate that policy.

Q. But you cannot state positively as a fact that these responsible officials of your company who had these conversations with your competitors on pricing policies have gone beyond the avowed and announced policy of the company, can you?

A. I know my associates very well, and it is inconceiv-

able to me that they would violate specific instructions they had along that line.

Q. That is a matter of assumption on your part, is it not, Mr. Porter?

A. It is based on my knowledge of my associates.

Q. Your testimony as to agreements and understandings, such as you have given on your direct examination, applies with equal force to your knowledge and experience as to the operation of not only The North American Cement Corporation but also the Security Cement &
34006 Lime Company, and at which time you served as an official of it?

A. Yes, I think I can say so.

By Mr. MacIntyre:

Q. Who were the other officials of that company at the time you served as one of its officials?

A. Mr.—well, during that period there were three presidents of the company. First, Mr. Charles Catlett; second—

34007 Q. How do you spell that name?

A. C-a-t-l-e-t-t.

Second, Mr.—

Mr. MacIntyre: Just a moment.

Will you please give the period over which they served and give the Reporter the full name at the same time.

A. I can give that approximately.

Mr. Catlett served as president during the year 1913 and the early part of 1914; and then Mr. J. A. Mason became president, and served through the year 1914 and the early part of 1915; then Mr. Loring A. Cover, C-o-v-e-r, became president, and served from that time until the properties of the company were bought by The North American Cement Corporation.

Q. And your testimony as to these agreements and understandings, of course, applied as to the actions of those men as well as yours, while they were responsible officials of that company?

A. Well, I have—I cannot speak as to their actions with the same certainty as I can of my own; but I have every reason to think that they did not enter into any agreements or understandings; or anything of that sort.

Q. You have given testimony here with the intention of having it to appear to the effect that they have not

entered into any agreements or understandings with
34008 competitors of your company, have you not?

A. To the best of my knowledge and belief, they did not.

Q. Did you attend meetings at which groups of your competitors, or representatives of groups of your competitors, were in attendance during the period that those three men served as president of the Security Cement & Lime Company?

A. I did.

Q. Will you tell us about the dates, and the places, and the nature of those meetings, in so far as you recall them?

34009 A. Mr. MacIntyre, that has been a good many years ago, but I do recall that I attended annual meetings of the Portland Cement Association during that period.

By Mr. MacIntyre:

Q. Didn't you attend meetings of its predecessor in name?

A. Yes, I believe there was a change in name somewhere in that period; I had forgotten that.

Q. What was the name?

A. I have forgotten, you will have to remind me.

Q. The Association of American Portland Cement Manufacturers?

A. I think that's right; I had forgotten all about that.

Q. Do you recall that during these meetings that you attended with these other associates of yours of the Security Company, in groups with your competitors, that discussions were had concerning prices and price policies?

A. I never—

34010 Q. And the sales practices in the industry?

A. I have never heard any such discussions as that—as you describe, Mr. MacIntyre.

Q. It is your testimony that no such discussions took place at these meetings?

A. I have no recollection whatever of anything of that sort.

Q. Can you name some of the other gentlemen who attended the meetings of that Association at the time you attended?

A. My recollection is very vague on that, but I think I can recall a few names. I remember Mr.—

A. Well, during that time my interests were chiefly in the technical processes of manufacture, and that is the reason why the men that I remember were associated to that end.

I remember Mr. Ray Baer, who was connected with the Lehigh Portland Cement Company, and I think at that time he was an engineer for them.

I remember Mr. S. Henry Harrison, who was an engineer, I believe, of the Vulcanite Company.

I remember a Mr. Krarup, K-r-a-r-u-p, who was, I believe, superintendent for the—for some company in the Middle West.

34011 Let us see; I remember a Mr. Frank McKelvey, who was at that time operating manager of the Alpha Portland Cement Company.

I remember a Mr. Joseph Brobston, who at that time was connected with the Dexter Portland Cement Company.

By Mr. MacIntyre:

Q. Presently with the Hercules?

A. Now with the Hercules, yes.

I remember Mr. W. H. Klein, K-l-e-i-n, who at that time was superintendent for the plant down in Tennessee—I don't think I can think of any more.

Q. Do you recall that Mr. Robert Leslie, of the American Company, attended?

A. Yes, I remember Mr. Robert Leslie; I used to see him occasionally.

Q. Do you recall that Mr. John Lober, L-o-b-e-r, and Mr. W. D. Lober, of the Vulcanite Company, attended?

A. I remember them; I don't think I ever talked to them.

Q. Well, you remember seeing them at the meeting?

A. I remember seeing them at the meetings.

Q. Do you remember Mr. E. M. Hager, president of the Universal Company, in attendance?

A. Mr. Hager left the industry very shortly after I came in; I think I did see him at one meeting; I don't think I ever talked to him, however.

34012 Q. Do you remember Mr. John Morron of the Atlas Company, in attendance—as being in attendance?

A. I don't.

A. I don't think I ever saw Mr. Morron at a meeting

during that period. I can only remember seeing him at one meeting; and I think that that was years later after The North American Cement Corporation had been established.

By Mr. MacIntyre:

Q. Do you remember Mr. Bayle of the Glenn
34013 Falls Company being in attendance at the meeting?

A. That is pronounced Mr. "Bail."

Q. Bayle, then (pronounced "Bail").

A. I am not sure whether I ever saw him at that early day or not; I have seen him at meetings since.

Q. And you cannot recall the nature of the discussions that took place at the meetings?

A. Well, the discussions that took place at the meetings, as far as I heard them, were more or less formal meetings connected with the business of the Association, and particularly, as far as I was concerned, discussions on the technical phases of manufacture, because that was the phase in which I was particularly interested at that time.

Q. Well, after you became an official of The North American Cement Corporation, did you attend meetings of any association of the industry?

A. Yes.

Q. At which competitors or representatives of your competitors attended?

A. I continued to attend meetings of the Portland Cement Association.

Q. What about the Cement Manufacturers Protective Association?

A. Well, my recollection of that is very vague; I don't think I ever attended any meeting of that organiza-
34014 tion; if I did, it has wholly left my mind now, and I am quite sure that that organization was out of existence before the North American Cement Corporation was formed.

Q. Well, while you were an official of the Security Cement & Lime Company, did you attend meetings of that association?

A. I don't think I ever did; I have no recollection of it.

Q. Is it your testimony that officials of the Security Company did not attend?

A. I have no recollection of that, either; I couldn't say.

Q. I believe you testified this morning to the effect that

you became a member—that is, The North American Cement Corporation, your present company—became a member of The Institute in 1933?

A. Yes, that's correct.

Q. On what date during that year?

A. Well, I can't recall the exact month and date, but I think it was in the spring of 1933.

Q. How soon after your company became a member of that association did you become a trustee of its board?

A. Well, it was very soon after, if not at the time.

Q. Well, within a month, would you say?

A. Well, my recollection of the circumstances is that the Institute had been dead, or dormant, and that it was revived for the purposes of the N. R. A., and that when it was reorganized for that purpose I was made a trustee, and just how that compares with the date on 34015 which we joined, I could not say.

Q. Well, somewhere—

A. It must have been very close to the time.

Q. Approximately June, 1933; is that correct?

A. It might have been; I would think it wouldn't be any later than that.

Q. And you continued throughout the period down to date as a trustee of the board of that association?

A. That's correct.

Q. That is, of The Cement Institute.

(Witness makes no further response.)

Q. And how many meetings of the board of trustees do you estimate that you have attended during that period?

A. Oh, I have—any idea. I have attended almost all of them, and during the period of the N. R. A. particularly, why, we—I wouldn't know whether we had one continuous meeting, or a hundred individual meetings, we practically lived down here at Washington for weeks at a time.

Q. Well, since the N. R. A. there have been quite a number of meetings of the board of trustees of The Cement Institute, have there not?

A. Yes, there have been quite a few.

Q. And you have attended them?

A. Yes.

Q. Can you give us an estimate of just about 34016 how many you have attended?

A. Well, I haven't any—I haven't much idea, Mr. MacIntyre, it might have been—

Q. How regularly have they been held?

A. Well, immediately following the N. R. A. I think that there were probably a number of meetings in rather quick succession; since then it is my recollection that they have only been held as a rule about twice a year.

Q. Well, about mid-year 1937 did you hold one?

A. I can't remember dates of that sort; I couldn't say. Let me see, 1937, is there any special event that you can tie it up with that would help me to remember?

34017 Q. Mr. Werle has called one to your attention—that is the instance of the complaint in this case, of July 2, 1937.

A. Yes, I recall that there was a meeting some time after that.

Q. Well, did you have one some time immediately prior to that?

A. I have no recollection of one immediately prior to that.

Q. Now, you have told us about these meetings over a period, and the practice of holding them.

A. Yes.

Q. They continued right on down to date, haven't they?

34018 A. Well—

Q. That is, the practice has.

Mr. Werle: That is objected to, Your Honor; it is going beyond the date of the complaint again. Are we going beyond—

Mr. MacIntyre: I withdraw the question.

Mr. Werle: —1937, or aren't we?

Trial Examiner Norwood: I think that Counsel might re-form that question so as to make us happier.

Mr. MacIntyre: I think it is a proper one but I will withdraw it.

Trial Examiner Norwood: Yes.

By Mr. MacIntyre:

Q. As a member of the board of trustees of The Cement Institute, hasn't it been one of your functions, Mr. Porter, to call meetings of the members of The Cement Institute in districts 1 and 2 from which you were trustee?

A. Well, I was trustee for the district including New York State. I never can remember whether that is district 1 or 2, and it was the part of my duty to call meetings occasionally for the members in that district. Usually we—

the trustee for the other district called a meeting of his members at the same time.

Q. How frequently have you held meetings that you called in your district?

34019 A. Well, very occasionally. One of the reasons for calling such meetings was that according to the constitution or by-laws, or whatever it is in the Institute, the trustee was obligated to call the meeting to hold an election for the district trustees, so that once a year I had the obligation of calling the meeting for that purpose. Now, there have been other meetings called in between times, but that was one of the principal reasons.

Q. Well, as to these meetings between times, can you throw any further light as to those, as to the regularity of the calling of those, and the holding of them, and the purposes, and the nature of the discussions had at them?

A. As far as I can recall, there was no regularity. As to the purposes, I think that each one was for some particular purpose. There was no continuity there. I think that usually they were to get the sense of the industry on matters which were being discussed by the board of trustees.

Q. You had, as a general rule, good attendance of the members of your district at the meetings you called, did you not?

A. Well, I think they varied. I think there were some meetings at which there was good attendance, and some others at which there was not.

Q. Do you recall a meeting that you attended at your call, a meeting that was held at your call, at which you attended during the fall of 1936 in New York?

34020 A. No, I do not recall that specific meeting.

Q. You recall Mr. Stark attending meetings you called of representatives of your membership in your district, do you not?

A. Yes, I think I can say that Mr. Stark was present at some of those meetings.

Q. That is, representing the Universal Atlas Cement Company in your district, at the meetings which he attended?

A. Well, I wouldn't know that. I know that he is connected with the Universal Atlas, but whether he officially represented them or not, I wouldn't know.

Q. One of its officials, isn't he?

A. I think he is.

Q. Coming to this subject of your policy with respect to permitting shipments of Portland cement by truck, especially trucks of your customers, I believe your testimony on direct is to the effect that you discontinued that practice in 1932, about June and August?

A. I think it was May. My recollection was if was May at Security, and August, perhaps, at the northern plants.

Q. Now, have you since that time permitted trucks of your customers, as a policy, trucks of your customers, generally, to come to your plant at their will and carry away cement that they desired to purchase from you in trucks of their own?

A. No, we have only permitted that where it was
34021 necessary to meet a competitive condition.

Q. To one or two customers at or near your plant?

A. No, I think there may have been several instances in which we have done it, but the only one that I can recall is certain customers in Oswego County, N. Y.

Q. Well, in those instances it has been your policy to charge the customer the same price as he would have paid if he had taken carload delivery at his destination?

A. Yes, I think that was true.

Q. And with respect to the deliveries from your warehouse down on K Street here, in Washington, to trucks of customers, you charge them in those instances the delivered price at Washington, don't you?

A. Yes.

Q. Do you know of any difference in the delivered price that you thus charge your customers from the prices charged by your competitors for cement in Washington?

A. No, I do not. If we would have found that they made a lower price then we would meet it.

Q. As far as you know, it is the same?

A. As far as I know, it is the same. It is the business of our salesmen to keep us in touch with that.

Q. Now, you have stated on direct examination a number of the reasons why you have discontinued this policy of permitting customers to come to your plant and
34022 take cement away in their trucks; that is, you stated a number of reasons on direct and—

Q. Now, those are reasons that you are stating as of today; isn't that correct, Mr. Porter?

A. You are referring to the reasons why——

Q. Why you discontinued.

A. Why we discontinued?

Q. The policy of permitting your customers to come to your plant and take away cement in their trucks.

A. Well, the reasons would still hold today.

Q. But they are the reasons that you stated yesterday and today?

34023 A. Yes.

Q. Will you please tell me, Mr. Porter, why it is that when you made replies, or your company made replies to the so-called Professors Burns and Clark questionnaire back in 1935, as is shown by Commission's Exhibits 969-4-K, 969-5-N, and 969-5-Z, you included as one of the reasons for discontinuing trucking the following statement: "Because method of calculating price based on delivered price at point of consumption could not be followed when point of consumption was not definitely known," but that you did not state such a reason yesterday and today in your testimony at that time, and you have not in your testimony here stated this reason that you gave Professors Clark and Burns as of 1935.

A. Why, I think that that reason is implied in the statement I made as to the position of our dealers. I was referring there to the fact that if we permitted anyone to come and truck from our plant, then our dealers—some of our dealers will find that bootleg suppliers, irresponsible customers elsewhere would truck cement into their home towns and compete with them as they would think, at least, unfairly, and we had many complaints of that sort. In other words, it was necessary for us to control the delivered price to a dealer in a given town in order to keep him satisfied.

Q. Well, this reason that you stated in these
34024 Commission's exhibits in 1935 is one of the real reasons, if not the principal reason, despite the fact that you haven't stated it in your testimony here?

A. The principal reason was that it was necessary to keep our dealers satisfied to keep the good will of our dealer trade.

Q. Well, I am speaking of this as a reason.

A. And that is all tied up in that reason. That is one of the reasons why the dealers were dissatisfied with the practice of trucking.

Q. Well, it is one of the reasons you were dissatisfied with it, too, wasn't it, as you stated to Professors Clark and Burns?

A. We cared nothing about that except as it affected the attitude of our dealers.

Q. When trucking was carried on under the method as it was carried on previous to 1932, you couldn't determine what the prices of your competitors were to their dealers at various destinations; could you?

A. That didn't refer in any way to prices of our competitors.

Q. Well, I am asking you for your reply to the question on the facts as you knew them.

A. I am afraid I don't understand what the question is at the moment.

Q. I will restate it. As trucking was carried on
34025 previous to 1932, you were unable to determine what the prices were that were being paid by the customers to your competitors; were you?

A. If I understand what you are getting at, Mr. MacIntyre, I don't think that is quite the case. The areas in which truck deliveries prevailed around our plants were not areas where our competitors could reach with trucks. Our competitors had to ship in there by rail and we had no difficulty in determining what their prices were at those points.

Q. What about Albany? You and a number of your customers had customers in Albany that took cement by truck delivery, didn't they, previous to 1932?

A. I couldn't say that. I am just not close enough to the details of sales to know just where these points were that we were trucking or that we permitted trucking.

Q. Isn't the same thing true with respect to Allentown, Easton, Pa., and other towns through that vicinity?

A. I am pretty sure that none of our cement was trucked into Allentown or Easton or any of those points.

Q. What about Hagerstown?

A. Yes, there was—

Q. Baltimore?

A. I am pretty sure that none of our cement was trucked into Baltimore.

34028 Washington, D. C.,
Thursday, March 7, 1940.

34029 JOHN J. PORTER thereupon resumed the stand and testified further as follows:

Cross-examination by Mr. MacIntyre (Continued).

Q. Mr. Porter, I call your attention to a question I put to you yesterday afternoon appearing on page 34023, line 2, and running through to line 13 of that page.

I would like to add to that question this further supplement and ask you to answer it in the light of the supplement:

In your testimony on direct examination why didn't you state to Mr. Werle in the words that you stated it to Professors Clark and Burns the reason for discontinuing the trucking in 1932 in buyers' trucks from your plants?

34030 A. Mr. MacIntyre, I did not remember in just what language I had answered the Burns and Clark questionnaire. As a matter of fact, I had not seen that Clark and Burns questionnaire since the time when we made it out—and I am not sure that I would have answered the question just the same anyway, but that I think is a sufficient reason. I think that answers the question.

By Mr. MacIntyre:

Q. You think the reason you stated in the questionnaire as of 1935 was a statement of a sufficient reason for discontinuing trucking in 1932?

Mr. Werle: Well, now, unless Counsel shows the witness what his answer was to the Burns and Clark questionnaire in 1934, I do not think the question is proper.

34031 Trial Examiner Norwood: The objection is overruled.

A. Well, that's one way of stating it. I don't think it is the best way of stating it.

By Mr. MacIntyre:

Q. Well, I understood you to say that you considered it a sufficient reason, and I was attempting to see if I clearly understood the application of your statement.

A. As a matter of fact, it is only a part of the reasons. It is an incomplete statement of the reasons; as far as it goes it is all right.

Q. Why didn't you make the statement more complete when Professors Clark and Burns asked for you to state your reasons in 1935?

A. Well, I am not sure, but I am under the impression that there were other questions, the context there, which probably did bring out the facts that I intended to be brought out.

Q. Well, I will call your attention to your questions as they appear in those questionnaires, now in the form of Commission's Exhibits 969-4-K (showing document to witness) just a second—969-5-N and 969-5-Z, and ask you to state whether or not you can find any statements or reasons that you made to Professors Clark and Burns in 1935 in those questionnaires as to why you discontinued trucking other than the one stated in this way, because method of calculating price based on delivered price at point of consumption could not be followed when
34032 point of consumption was not definitely known?

A. Well, Mr. MacIntyre, I would have to look through this whole thing to be sure. I had an impression that there were some questions in here somewhere as to the objections to the dealers—objections of the dealers to a method of delivery which left the delivered price uncertain.

Q. No, I can't find it in your questionnaire. This answer that I just read is in response to the question "Reason for abandonment of former policy:"

A. Yes. Well, what I referred to in answering that is the fact that the dealers want a known delivered price, and I think that it must be in here somewhere or other, some questions that bear on that.

Q. Well, will you please locate it if you think it is in that questionnaire?

A. Well, I haven't seen this thing since the time I made it out, and I may be mistaken.

Q. Well, you will be willing to rest on what it shows, will you, in that respect?

A. Oh, I will have to rest on what it shows because I—

Q. In other words, if you were in error as to—

A. I may be in error on that.

Q. —as to a showing of other reasons?

A. I was under the impression that that is why we answered that in that way.

34033 Q. Isn't it also a fact, Mr. Porter, that when you can't follow your usual method in calculating deliv-

ered prices and your competitors cannot follow the usual method in calculating delivered prices, that it is far more difficult for you and for your competitors to quote uniformly identical delivered prices at a given destination?

34034 A. Mr. MacIntyre, we don't make any attempt to quote uniform prices. We have no interest in quoting—in quoting uniform prices. We have no interest in quoting uniform prices; our interest is in quoting a price as low as any one of our competitors.

By Mr. MacIntyre:

Q. You don't attempt to quote them any lower, do you?

A. No, not as a rule.

Q. Do you attempt to quote them any higher?

A. It wouldn't be any use to quote it any higher; if we had in mind quoting higher we just wouldn't quote at all.

Q. Well, if you don't attempt to quote them any lower, and then make no effort to quote them any higher, then what is your effort with respect to quoting the same?

A. Let me—

Q. You expect them to be the same, don't you?

A. We expect our price will be the same as the lowest quotation of any of our competitors.

Q. That is, as quoted at a delivered point?

A. As quoted at a delivered point.

Q. And your efforts to secure that result, in your opinion, would be somewhat frustrated if you delivered to buyers in their trucks at your mill and your competitors did likewise; isn't that correct?

A. I really don't know. I don't know how to answer that.

34035 Q. Almost at the beginning of your direct examination I believe you stated that you had initiated prices only twice on behalf of your company, the North American Cement Corporation. Do you recall that testimony?

A. Well, if I stated only twice, I think I was in error; I think there have been three times.

Q. Well, you gave the Baltimore prices of December, 1936, as one instance, and you gave the installation of a base, that is, a base price at Security or Hagerstown, Md., in 1937—1938, I believe, is the second instance.

A. Yes.

Q. Were there any others?

A. Yes, there have been at least two others. We initiated a lower price in the Brooklyn stocks in Brooklyn in 1935—was it? 1934?

Q. That was July, 1935.

A. Yes. And then in the early days of the company there was a base put in at Howes Cave.

Q. That was on what date?

A. Why, I have no personal recollection of it, but I think it was brought out in the record that it was in 1931.

Q. Just about at the height or depth of the depression of the early '30's?

A. I think it was what has been referred to as the price war.

34036 Q. And didn't you also initiate the withdrawal of the Brooklyn stocks in 1935?

A. Yes, yes, we did.

Q. And you notified The Cement Institute, that is, the Trade Practice Committee of The Cement Institute of your installation of those stocks during July, 1935, and your withdrawal of them in December, 1935, didn't you?

A. I remember clearly that we filed prices when they were initiated. I don't remember when we took them out, but if the filing of prices was still in effect at that time, we undoubtedly did notify them of the change.

34037 A. My recollection is that the Supreme Court decision was in the spring of 1935.

By Mr. MacIntyre:

Q. So this was subsequent to it that you were filing these prices with The Cement Institute?

A. If my recollection is correct, that is the case.

Q. Now, Mr. Porter, I show you Commission's Exhibit 551-2-C and 2-D, and ask you if that isn't the price list of your company issued to become effective as of December 28, 1936, about which you testified in response to questions propounded to you by Mr. Werle?

A. Well, filing this price list was handled in our sales department. I didn't see it at the time. If this is what it purports to be, I have no doubt but what it is.

Q. This price list, which is shown by Commission's Exhibit 551-2-C and 2-D that you testified to on direct, you had passed out to your competitors?

Mr. Werle: Now, I object to that, Your Honor.

A. I don't think I—

Trial Examiner Norwood: Wait a moment.

Mr. Werle: On the ground the witness didn't so testify.

Trial Examiner Norwood: Read the question.

34038 (Question read.)

Trial Examiner Norwood: Did you testify to that effect?

The Witness: I didn't testify, Judge, that we did. I said I had no knowledge whether we had or not; that we might have done so. If we had, it would not have been contrary to our policy.

Trial Examiner Norwood: All right. I will sustain the objection.

By Mr. MacIntyre:

Q. Mr. Porter, I show you your testimony beginning with questions and answers, line 19, page 33870, and line 17, page 33899, concerning your practice of notifying your competitors of the price changes. I will ask you to explain so that we will know whether or not it has been your practice to notify your competitors of price changes such as this one that occurred at Baltimore in December, 1936?

A. You want me to explain my testimony further?

Q. Yes, so that there appears to be an inconsistency in that testimony with that that you have just given, and I want to know whether or not there is an inconsistency or whether there just appears to be one.

A. Well, Mr. MacIntyre, it is our policy not to notify our competitors in advance of making a price change. After we have made the change and quotations have been sent out to our customers, we then have no objec-

34039 tion to giving a list of these prices or giving any information about those prices to any competitors who may ask for them. I do not handle those matters. The policy is well understood in our sales department and they are free to answer any inquiries that may come in without referring them to me. I have no personal knowledge that any inquiry such inquiries were received and were answered, but I tried to, and I think I did state clearly in the testimony that there might have been some inquiries and they might have been answered. I have no personal knowledge that that was the case.

Q. Well, you expect and receive similar treatment from your competitors, don't you?

A. I don't know just how to answer that, and as a matter of fact, I don't know that I have any knowledge of the circumstances. I have no knowledge, myself, of our com-

petitors' policies in that. It may be that our sales department know that certain competitors will give them information of that sort if they ask for it, but I don't have any knowledge about that.

Q. Well, can you account, except in the manner that you testified, for the fact that the Nazareth Cement Company had in its possession, and produced to the Federal Trade Commission under subpoena duces tecum this price list of yours, which is Commission's Exhibit 551-2-C and 2-D?

34040 A. No, I wouldn't know how to account for it in any other way.

Q. Except that you had sent it to them?

A. I think undoubtedly that they asked for it and that we sent it to them.

Q. You sent it to them before you had withdrawn the prices from the Baltimore area? I understood you to say that you have not withdrawn them even to this day?

A. Oh, no. I would suppose that this was sent to them while the prices were in effect. As a matter of fact, the prices are in effect today except for minor changes at some stations.

34041 Q. Well, you do not wish to change the testimony you have previously given to Mr. Werle on that point; do you, Mr. Porter?

A. No.

Trial Examiner Norwood: I want to get that clear. That refers to giving these prices to competitors. As I understand it, you testified that you do give customers notice of an advance or price change, do you not, and name the effective date?

The Witness: We give customers notice of a change in price and name an effective date, yes.

Trial Examiner Norwood: Yes.

By Mr. MacIntyre:

Q. After notifying your customers in advance of an effective date, which I understand in the case of this change at Baltimore during December, 1936, took place on the 26th?

A. Yes.

Q. And the effective date was the 28th? Do you recall?

A. Yes, I think I remember that.

Q. So it is compatible with your policy to after notify-

ing your customers on the 26th of December, 1936,
34042 to give your competitors, if they ask for it, for the information, lists of the prices that you make effective on the 28th even though they ask for it on the 27th; is that correct?

A. I have already testified that we did not notify our competitors about changes in prices before they were sent out to our customers. They have, therefore, no means of knowing what changes in prices we have made until
34043 they pick them up in the field. Now, if they should pick them up in the field on the 27th, and telephone in to us then and ask about them, I presume that our sales department would answer inquiries.

Q. Even though those prices on the day they phone in are effective prices for sales, say, the following day and the following week; isn't that correct?

A. Well, it is always our practice to make the prices effective within a day or two after we send out the notices.

Q. And continue effective for solicitation of orders and sales?

A. Yes. Well, we hope that they will continue to be effective for some time.

Q. Is there any difference in that policy with respect to any change in price you make at any time?

A. Well, yes. We have made changes in prices in individual cases that did not reflect—at least we hoped would not be reflected in a change in market prices. We don't notify customers of such changes.

Q. Well, where you issue quotations to your customers as to any price changes, you follow through if circumstances give rise to the occasion for you to in notifying your competitors in no different manner than you have with respect to the Baltimore change in 1936; is that correct?

34044 A. We never notify competitors, Mr. MacIntyre. We answer inquiries after the prices have gone out to our cusomers. If our competitors make such inquiry. But we never take the initiative in notifying them.

Q. You follow a policy in doing that in that way as to any price changes that you make, don't you?

A. Well, I have to distinguish between price changes. Any change which is published to our trade.

Q. Yes, that is what I am talking about.

A. We follow that policy on it.

Q. That is, where the price changes are general or whether they are of the type that took place in the Baltimore area?

A. Yes, yes, that is true.

Q. You do not, do you, Mr. Porter, issue price lists of the type shown by Commission's Exhibit 551-2-C and 2-D to your dealer customers or contractor customers; do you?

A. We would if they asked for it, but I think our usual practice is to send a delivered price quotation to each of our customers at each of the points.

Q. That is, you would send them a price quotation for one of those points where they are located?

A. Yes, unless they asked for a general list.

Q. And what is the policy with respect—I mean, the practice with respect to them asking for such lists as that one?

34045 A. I don't know whether we have had inquiries of that sort or not, but it would not be contrary to our policy to give any one, you or a dealer, or a competitor, or a trade paper, or anyone a complete list of our prices after they have been sent out to our trade.

Q. What is your knowledge as to whether or not this one was sent out to anyone in your trade other than your competitors?

A. I have no knowledge at all because those matters are handled in our sales department.

34073 Q. Mr. Porter, can you tell us what the appraisal value of the three separate companies were that formed this corporation, the North American Cement Corporation?

34074 A. No, I can't tell you offhand.

Mr. Werle: What is the date of this, now, if Your Honor please? This is going back to something else again.

By Mr. MacIntyre:

Q. Can you tell me, approximately, what they were?

Mr. Werle: I object to it on the same ground.

Trial Examiner Norwood: The objection is overruled.

A. I can tell you that the appraisal value was somewhere between twelve and twenty million dollars, but I don't think I can place it any closer than that.

By Mr. MacIntyre:

Q. Well, wasn't it about twelve million, just a little over twelve million?

A. Of the three companies?

Q. Yes.

A. Of the three plants?

Q. Yes.

A. I thought it was more than that. I can't substantiate you on that.

Q. Isn't that approximately correct, that it was between twelve and thirteen millions?

A. It was my recollection, Mr. MacIntyre, I would have thought it was more than that, but I have no definite recollection of the figures now except it ran up in that order.

34075 Q. Isn't that a fact, that the capitalization of the North American, between the time of its formation and this reorganization, was approximately twenty million?

A. It couldn't have been. If your statement as to the appraisal is correct, the capitalization couldn't have been that much, because there wasn't any wide spread between the appraisal of the plants and the capitalization.

Well, the capitalization was approximately twenty millions of dollars, wasn't it?

A. I can't—I don't know. I would have to look up my figures, my records, to find out.

Q. What was the capitalization immediately after the reorganization that you testified about on direct?

A. Well, I can't give you those figures, either, without looking up the records.

Mr. MacIntyre: If Your Honor please, the examination of the witness on that point has demonstrated that it will be necessary for some further cross-examination on the point if the point is to be cleared up, and we do want it cleared up if it is to stay in the record.

Mr. Werle: May I make one point clear? Let's have this out, now. What points are we trying to clear up?

Mr. MacIntyre: As to whether or not it was a real and necessary reorganization in 1932, and the reasons for it.

34076 Mr. Werle: I don't think that is involved.

Mr. MacIntyre: I think it all should be stricken from the record, but—

Mr. Werle: The question of whether or not it is real or imaginary hasn't anything to do with it, if it occurred.

Trial Examiner Norwood: I think we can settle this

now. If there is any further information that the Counsel wants, he may bring this witness back on redirect and he may ask him leading questions about this particular thing.

Mr. Werle: He has been doing that, anyway.

Trial Examiner Norwood: Simply notify him as to what information you want him to bring back.

Mr. MacIntyre: If Your Honor please, in connection with your ruling not to strike the testimony that we moved you to strike, will you consider your ruling in that respect, that is, refusing to strike it, on the point that we shall be given, or representatives of the Commission shall be given access, without subpoena, to the records of the company for the purpose of attempting to ferret out the facts so that we may clear this up?

Mr. Werle: Well, now, I certainly object to any such blanket ruling, and I am sure Your Honor won't make any such blanket ruling as that at this time. It is
34077 this question of finishing expedition.

Trial Examiner Norwood: I think we will take that matter up later. You see if you can get that information and we will climb that hill when we get to it.

Go ahead.

Mr. Werle: If they will tell us what they want definitely—

Trial Examiner Norwood: Proceed with the cross-examination.

Mr. Werle: —perhaps we will give it to them.

Trial Examiner Norwood: Notify the Counsel and witness what you would like to have and let's see whether or not they will produce it.

Mr. MacIntyre: It seems we ought to be able to get an expression from Counsel and the witness whether they will be willing to permit an examination for the purpose of determining whether or not we should want him back.

Mr. Capen: I think after our previous experience with Counsel for the Commission on that, I would answer no, Your Honor.

Trial Examiner Norwood: All right.

Mr. MacIntyre: Well, on that basis, I move that the testimony be stricken on this point.

Trial Examiner Norwood: Motion denied.

34078 By Mr. MacIntyre:

Q. Mr. Porter, you have mentioned that you had

all of these three or four price changes, the one at Baltimore, the one at Security or Hagerstown, and the putting of the stocks in Brooklyn and taking them out in 1935.

You haven't mentioned that you made any change in price that resulted in the placing of a base at your Catskill plant, I believe. Did you ever make any base there?

A. No, Mr. MacIntyre, we have never made a base there, but I think I explained on direct that that plant was automatically a base point because of our competitor's plant immediately adjacent.

Q. You never put a base in at Howes Cave for the purpose of figuring prices by car, carload delivery from there to delivery points, did you?

A. You mean by railroad car?

Q. Yes.

A. Well, there was a base put in there. I think it was in 1931. That was before I was president of the company, and I am not fully informed as to the reasons why it was put in and taken out.

Q. That was for truck deliveries as of that date, wasn't it?

A. I think it applied to rail deliveries, also.

34079 Q. But it stayed in only a short time?

A. Yes, that is correct.

Q. And except for the brief period there has been no base in at Howes Cave from the time you owned it in 1926 down to date?

A. That is correct.

Q. I believe you stated that when you acquired that plant, that it wasn't acquired with any consideration or thought to the price methods or prices that you would be able to take advantage of through that acquisition?

A. It was not acquired with any view to pricing methods, no.

Q. You didn't give any consideration to them?

A. No.

Q. You did know at the time you acquired it, however, that prices throughout the territory in which that mill was located, as well as the territory to the north and west of it, were based on Hudson Valley; isn't that correct?

A. Oh, that fact must have been known, yes.

Q. And the Howes Cave mill has a considerable freight advantage over the Hudson Valley mill with respect to shipments in to the north and west territory of New York State; isn't that correct?

A. In a certain area, yes, it does.

Q. How much freight advantage is that?

A. I couldn't tell you, Mr. MacIntyre; I am not familiar with freight rates.

34080 Q. At the time you took it over, it ran upwards of 40 or 50 cents a barrel, didn't it?

A. I don't know. I have no knowledge as to the amounts.

Q. And there is still a considerable freight advantage, that is, a substantial freight advantage?

A. I know there is some freight advantage, but I couldn't tell you how much it is.

Q. That is especially true as to some important markets or consuming points such as Utica, points immediately west and north of it?

A. I wouldn't think so. The Janesville plant and the Portland Point plant of the Penn-Dixie are closer to Utica than we are.

Q. Well, that was probably a bad selection on Utica, but other important consuming centers to the north and west of Howes Cave that are controlled by the Hudson Valley base give the Howes Cave the freight advantage of the Hudson Valley mills to such points?

34081 The Witness: I don't know. I don't know. I don't have any knowledge of those freight rates.

By Mr. MacIntyre:

Q. Well you have stated that there was a freight advantage?

A. There is a freight advantage in a certain area around Howes Cave. My opinion is that it doesn't extend very far or take in any large markets.

Q. But it did, as you indicated on your direct testimony, at one time extend as far as Buffalo before Janesville and Buffalo and other points had mills put in there and base points?

Mr. Werle: I object to that question. The witness said no such thing.

34082 A. Well, if it refers to freight advantage, that statement is not correct.

By Mr. MacIntyre:

Q. You mean to say that when you established that mill at Howes Cave, that it didn't have a freight advantage over the Hudson Valley mills on shipments in the direction of and practically reaching Buffalo?

A. I didn't understand you were referring to freight advantage over Hudson Valley mills. I thought you referred to freight advantage. We undoubtedly had a freight advantage over the Hudson Valley mills when we went west, but we had—we were very much at a disadvantage compared with other mills located west of us.

34088 Q. What is the reason for your policy, Mr. Porter, in refusing to sell dealers in this country who handle imported cement?

Mr. Werle: If Your Honor please, I object to the question on the ground that it misstates the record.

Mr. MacIntyre: I understood the witness to have testified that he had that policy from time to time.

Trial Examiner Norwood: I think he did, but we
34089 might ask the witness about it.

Did you so testify?

The Witness: Well, if I understood the question correctly, he asked it in the present tense. That is not correct as of the present time, but there was a time in the past when we had a policy, not of refusing to sell dealers handling foreign cement, but of considering each such case as to whether or not we wanted to sell.

By Mr. MacIntyre:

Q. Well, you did refuse to sell some who handled imported cement, didn't you?

A. I have no knowledge that we ever did.

Q. Well, you investigated them for the purpose of determining whether or not that you would consider them one of the individual cases where such a policy would apply?

A. Why, I am not even sure of that. I would say that our sales—that we got reports from our salesmen as to which dealers in their territories were handling foreign cement.

Q. Why did you have the policy of having them to so report?

A. Because we decided not to solicit business from dealers handling foreign cement.

Q. And why did you decide not to solicit business from dealers who handled foreign cement?

A. Because we wanted to discourage the use of foreign cement in this country.

Q. Yesterday you stated you did not bid on this proposal which is now in evidence as Commission's Exhibit 1339, the so-called Good Friday invitation from the Procurement Division, because of what you termed practical difficulties that you had in mind at that time as operating against your bidding.

In that connection you stated that one of those was the requirement to make up cement that might not be taken. Your bid in response to that invitation would not have required you to make up any cement, would it?

A. Well, I thought it would; maybe I am mistaken.

Q. You could have limited any bid you made—you must have made—in response to that invitation to any quantity you desired up to three million—

A. Oh, yes.

Q. —barrels?

A. Oh, yes, that's correct.

Q. You could have limited it to 10,000 barrels, could you not?

34094 A. That's correct, yes.

Q. And the Government could not, under any contract that it would have asked for as a result of that bid, compelled you to furnish any more than the 10,000 barrels, could it?

A. That's correct.

Q. Now, as to the fourth reason that you stated, that is the provision for furnishing cement on other projects, other than direct federal projects, that is these residences, and so on—

A. Yes.

Q. —you would, of course, have furnished the cement out of the 10,000, or any other amount that you bid on?

A. Yes.

Q. To such projects?

A. Yes.

Q. You would not be compelled to furnish beyond the amount you bid on even for those projects, would you?

A. That's my understanding.

Q. Now, as to your third reason—well, that is your—your said you felt it would interfere with dealers' business. I think you have stated that as clearly as need be, unless you want to explain it further?

A. I have no desire to say anything further.

Q. Now, as to your second reason, you stated you did

not know the destination where the cement would go to, or its point of use. Why was that a practical difficulty
34093 that operated against your bidding on that invitation, Mr. Porter?

A. Because if it went to a destination where we had a good dealer, and was put on a job, that dealer might think that it was his business to furnish, then we would be in troubles with that dealer, and not only that, but the news would get around and we would be in trouble with all our dealers.

Q. You felt that you were influenced in failing to bid in that instance by the attitude and expression of some dealers?

A. Well, we had no expressions from any of our dealers in connection with this proposal; we knew their general attitude.

Q. And you were influenced by that attitude?

A. And we were influenced by their attitude towards such matters.

Q. Now, your fifth reason for failing to bid was that the invitation contained a minimum wage provision. Is that minimum wage provision contained in that invitation any more strict, I should say, than the one that is now in operation under the Walsh-Healy Act?

A. Well, Mr. MacIntyre, that was not a very serious reason with us, but I do remember that we discussed the matter at the time, and I think there was some uncertainty as to what the minimum wage provision would be under that bid. In other words, it referred to legislation which might be passed or rules which might be laid down.

Q. Well, whatever that it did become, though, you and your competitors would have been on an equal
34096 basis with respect to it?

A. Yes, that's true, and we probably would have gone along with anything of that sort, anyway.

Q. So that it really was not—

A. It was not—

Q. —an objection?

A. It was not a very serious objection, but it was one of the things that we discussed at the time.

Q. Mr. Porter, calling your attention to your testimony of yesterday, page 33903 (referring to official record), and beginning at line 7, will you tell me whether or not you discussed the situation that you describe there with anyone

in arriving at that decision, or involving those considerations?

A. I discussed the matter with no one except our vice-president, Mr. Harte, and our counsel, Mr. Capen.

Trial Examiner Norwood: What matter is that?

The Witness: That refers to a letter that we wrote to the Federal Trade Commission suggesting a conference—or, I beg your pardon—wrote to the Procurement Division suggesting a conference under the auspices of the Federal Trade Commission.

Trial Examiner Norwood: Yes. That is with regard to failure to submit f.o.b. mill bids?

(Witness makes no response.)

34097 Trial Examiner Norwood: That is with regard to this invitation for f.o.b. mill bids, is it?

The Witness: It is in regard to that invitation.

Trial Examiner Norwood: Yes.

The Witness: Yes.

By Mr. MacIntyre:

Q. Do you know whether or not that the people with whom you discussed this collaborated with others?

A. I am sure that they did not.

Q. That is, you are sure that Mr. Capen did not discuss it with Mr. Leisure?

A. Yes, I am.

Mr. Werle: Well, I object to that.

The Witness: I don't want to answer that question.

34098 Trial Examiner Norwood: Oh, well, he can tell that.

A. Well, I don't know.

34100 Mr. Brick: I do not want to state any additional grounds, but in view of Mr. MacIntyre's statement I would like Your Honor to know, as well as Mr. Wooden and Mr. MacIntyre, that Mr. Leisure's office, or rather nobody connected with his firm, gave any advice to any company with respect to the Good Friday bids.

Trial Examiner Norwood: Yes.

Mr. Brick: That was the definite policy of the firm, and I can assure you that it was followed in connection with each of the Respondent companies.

Mr. Capen: Your Honor, in view of Mr. MacIntyre's statement, I would also like to state that it is my recollection of the facts that the first time Mr. Porter com-

communicated with me on that subject he told me that he had decided in his own mind that he was not going to bid on this offering. We discussed the question from there on, but his decision, I think, had been made before he talked with me.

34101 By Mr. MacIntyre:

Q. You did know, though, did you, Mr. Porter, that Mr. Capen was collaborating through the period of several months with Mr. Leisure's firm, who represented The Cement Institute?

Mr. Werle: Now, I object to that, Your Honor.

Q. Didn't you?

Mr. Werle: I think we have had enough of this.

Trial Examiner Norwood: I think that he may bring out the facts here. The Counsel have made their statement here.

A. I don't know just what you mean by collaborating, Mr. MacIntyre. To my knowledge Mr. Capen had very little contact with Mr. Leisure or Mr. Leisure's office through that period.

By Mr. MacIntyre:

Q. Mr. Porter, your last answer on page 33903, beginning with line 7, refers to your consideration of this proceeding in connection with your consideration on that invitation to bid?

A. Uh-huh.

Q. You did know at that time when you discussed the matter with Mr. Capen that Mr. Capen was collaborating with Mr. Leisure on these proceedings, or Mr. Leisure's office; did you not?

34102 A. Well, I am afraid you will have to define the word "collaborating." I don't know what you mean.

Q. Well, discussing the matter of this proceeding with him.

A. I am not sure that Mr. Capen ever had any discussion with Mr. Leisure on this—on the matter of these proceedings, until shortly before I came down here to Washington.

34103 Q. Well, if you had made up your mind definitely, Mr. Porter, not to bid, and did not expect to change your mind from that position, what, if anything, did you feel was in the situation that called for a further discussion

with Mr. Capen concerning those projected conferences with the Procurement Division?

A. It was entirely a question of the wording of
34104 the letter, Mr. MacIntyre; I had definitely made up my mind before bringing Mr. Capen into the picture that we would not bid; but I felt that in view of the fact that this letter might perhaps be used against us at some time that I wanted the advice of counsel in drafting the reply.

Q. So, instead of it being used against you, after it was drafted in that way, it has been used in this case for you as a Respondents' exhibit?

A. Well, I know nothing about that, I am not—

Mr. Brick: I object to that question, Your Honor please. It has no propriety at all in a hearing of this kind.

Trial Examiner Norwood: The objection is sustained.

By Mr. MacIntyre:

Q. Well, it is in the case as Respondents' Exhibit 41, isn't it, Mr. Porter?

A. Well, I—

Mr. Brick (interposing): The records will show that. It is not a proper question.

Mr. Werle: I object.

Trial Examiner Norwood: Let him tell that—let him tell that, identify the letter as connected with these things.

A. I don't know—

Mr. Brick: Oh, let him do that, but I am objecting
34105 to Counsel's question; not Your Honor's question.

Trial Examiner Norwood: Go ahead.

Mr. Brick: May the question be read, Your Honor please?

Mr. MacIntyre: I will withdraw that and put another one to the witness; he has said he did not recall the number of the Respondents' exhibit.

By Mr. MacIntyre:

Q. You do recall that Mr. Werle showed you the letter yesterday and referred to it as a Respondents' exhibit in this case?

A. I recall that he showed me the record yesterday. I don't know how he referred to it. I haven't been following the letter, and I don't know what kind of an exhibit it is.

Q. Would you say that the considerations that you

had as are outlined at line 9 and following, on page 33903 (referring to official record) are the considerations that led you to discuss this matter with Mr. Capen?

Mr. Werle: May I have the pages, please, Mr. MacIntyre?

The Reporter: Page 33903.

Mr. Brick: I object to that question, Your Honor please. It is not only a duplication of many other questions that Mr. MacIntyre has put to the witness; but the witness just stated it in his previous answer and explained that situation.

34106 Trial Examiner Norwood: Yes. The objection is overruled.

A. (Witness consults official record.) What was the question?

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

A. (Referring to page of the record.) These are some of the considerations, yes.

34108 By Mr. MacIntyre:

Q. Mr. Porter, do you consider that it would have been possible for any entrapment that you suspicioned if you had bid as requested in the invitation?

A. Well, Mr. MacIntyre, I am not a lawyer, and I am so unfamiliar with legal matters and the issues in this case that I—that I—just feared to do anything at all for fear I might do something—that whatever I might do I might be wrong.

Q. Were you not advised that if you did bid f.o.b. mill there that it would weaken the position that was being taken by you and the other Respondents in this case—that to bid f.o.b. mill was impracticable?

A. No, I was not—

Mr. Brick (interposing): I object to that question, Your Honor please, as to what advice this witness might have obtained from his attorneys is not a proper subject of inquiry on an irrelevant matter of this kind. Now, Mr. Wooden and Mr. MacIntyre have been pursuing this particular subject but it does not appear what they are driving at.

Trial Examiner Norwood: Yes, but he was not asking him what his attorney said.

34109 The objection is overruled.

Read the question.

The Reporter: The answer was "No, I was not."
The Witness: I hadn't finished the answer.
Trial Examiner Norwood: Read the question.
(Last question read by Reporter.)
Mr. Werle: Well, advised by whom? If it refers to advice by his counsel—.
Trial Examiner Norwood: Let us bring out the main question first, lay the grounds for that.
A. I was not so advised by legal counsel, or by anyone else.

By Mr. MacIntyre:

Q. What prompted to your mind in the first instance the word "entrapment," Mr. Porter, as you have used it here?

A. Why, news as to the procedure as to the Federal Trade Commission and Government officials generally.

Q. You consider that—

Mr. Brick: It was just a matter of policy.
Trial Examiner Norwood: Off the record.
(There were comments made off the record.)
Trial Examiner Norwood: On the record.
Go ahead.

By Mr. MacIntyre:

Q. Do you consider that if the Procurement Division had asked for an f.o.b. mill bid that it would have
34110 been entrapping you into anything if you had bid as they had asked you to?

A. I had a suspicion that the bid, Procurement bid, had been, or was a result of some request by the Federal Trade Commission with a view to possibly getting something which might help their case. I didn't have any idea as to what that might be, because I am not a lawyer, and I am not familiar with the issues of the case; but because of the unusual nature of the bid,—of the proposal,—I felt that there was something behind it.

Q. Have you been able to locate any evidence, tangible or intangible, since that date, to indicate that your suspicions had any foundation whatever in that direction?

A. No, I haven't made any attempt to locate any, and haven't had any such evidence.

Q. Mr. Porter, I am showing you Commission's Exhibit 832-G. I will ask you to state whether or not you recognize the name of the persons at the top of that letter

to whom it is addressed as names of members of the board of trustees of The Cement Institute as of that time?

A. I know the names of all those who are there mentioned; but I couldn't tell you offhand whether they were members of the board of trustees of the Cement—whether each one of them was a trustee of The Cement Institute.

Q. You have known them as trustees of The Cement Institute?

A. I know some of them as trustees of The Ce-
34111 ment Institute, and others may be, but I just don't remember.

Q. You have known Mr. H. M. Scott as a trustee, have you not?

A. Yes, I have known him as a trustee.

Q. And you are a trustee?

A. And I am a trustee.

Q. And you have known Mr. Harry F. Jennings, H. F. Jennings, as a trustee?

A. No, I am not sure about Mr. Jennings.

By Mr. MacIntyre:

Q. Mr. A. J. Rooney,—do you recognize him as a trustee?

A. Mr. Rooney has been a trustee at least part of the time.

Q. Mr. M. C. Monday?

34112 A. Let us see—yes, I think Mr. Monday was a trustee at that time.

Q. Mr. M. M. Alexander?

A. I wouldn't be sure about him.

Q. Mr. C. Baumberger?

A. I couldn't be sure about him.

Q. Mr. C. Boettcher?

A. No, I know nothing about—

Q. Mr. John Trainor?

A. Let us see, this was in—yes, Mr. Trainor was a trustee before his death.

Q. Mr. E. P. Lucas?

A. Yes, Mr. Lucas was a trustee.

Mr. Werle: You skipped a name there, Mr. MacIntyre.

Q. Mr. C. B. Condon?

A. I don't remember about Mr. Condon.

Q. You stated on direct that you did not recall ever meeting Mr. Chaffee. You do recall other communications from him, and that refer to him, than the one that I

have just referred to, that is Commission's Exhibit 8324, do you?

A. No, I do not, Mr. MacIntyre.

Q. You had no difficulty in determining from this letter who Mr. Chaffee was?

A. Well, that's rather clear in the letter.

Q. Didn't you have some independent knowledge
34113 to who Mr. Chaffee was before you got this letter from Mr. Rader?

A. I think not. I may have heard his name before, but I am certain I never paid any particular attention to it, if I did.

Q. You do not recall the mention of his name at these informal gatherings right after adjournment of meetings of the board of trustees of The Cement Institute?

A. No, I do not.

Q. You do recall group discussions among members of the board of trustees immediately upon adjournment of their meetings, do you not, Mr. Porter?

The Witness: Will you read that question, please?

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

By Mr. MacIntyre:

Q. That is, informal discussions after adjournment of meetings of the board?

A. No, I don't think I do.

Q. They do not break up and go right off home immediately upon the falling of the gavel of the chairman on adjournment, do they?

A. That's usually been my practice; I cannot say what others have done.

Q. You have hurried out and left the others?

A. Well, I have usually gone out with a few others. I
34114 can't remember any instances now where I have stayed any length of time after an adjournment of meeting.

Q. But you have left others around the meeting on occasions when you have left after adjournment?

A. Well, I haven't always been the last one to leave; I admit that.

34115 Cross-Examination by Mr. MacIntyre (Continued)

Q. Mr. Porter, you testified that you were a member of the public relations committee of The Cement Institute.

A. Yes.

Q. Would you say that it was a fair statement that the organization of that committee as an instrumentality of The Cement Institute was for the purpose of informing certain persons and organizations among the public that there was no organization in the cement industry?

A. No, I don't think that would be a fair statement.

Q. Well, it was an organization for informing others outside of the organization that there was no organization for price fixing in the industry, wasn't it?

A. Well, that was one of the purposes.

34116 Q. And you attempted to do that by drawing up a publication—drawing up and publishing through the chairman, Mr. Affleck, certain statements that were distributed in newspapers and trade magazines?

A. There were some advertisements published, yes, and the publication of it—or the appropriation for advertising was passed on by the committee.

Q. Would you say that that advertising as thus carried on fitted into this program of publicity as outlined in the public relations plan for The Cement Institute, dated April 10, 1934, as is shown by Commission's Exhibit 2190-A to J, inclusive?

A. I will have to see what this is. I am not sure that I remember this paper, Mr. MacIntyre, but I presume it is all right, and it does seem to—just glancing through it hurriedly, it does seem to cover the outline of the activities and purposes of the committee.

Q. You say you don't recall that as a statement of the public relations plan that the chairman of the Public Relations Committee distributed?

A. I don't recall it distinctly, no, but I think it is quite probable that I received it.

Q. Looking at the last page of that, Commission's Exhibit 2190-J, that contains the list of groups and classes of people that you proposed, or your committee proposed to publicize with respect to the so-called misconcep-

34117 tions that you referred to on direct examination?

A. I think I remember seeing that list. I don't think it was ever the expectation of the committee that we

would be able to reach all of those persons, but these were the people that we proposed to reach, were among this list.

Q. It was the objective to be hoped for and attain, so far as possible?

A. That is true, yes.

Q. And it was really expected to be reached with respect to the most important classes in the list?

A. That is what we hoped, yes.

Q. And you consider—

Mr. Werle: Excuse me, Mr. MacIntyre. Was that an exhibit that is in evidence, or did that one go out?

Mr. MacIntyre: Yes, it is in evidence.

Mr. Werle: I see.

By Mr. MacIntyre:

Q. One of the important classes that you felt should be reached, and you hoped to reach, were cooperating organizations; is that correct?

A. If it says so there, I have no recollection of it; I have no independent recollection of that list.

Q. And another important one is the class of building material dealers.

A. I have no independent recollection, but if it
34118 says so there, that was the case.

Q. You considered them important as constituting an important class for you to reach?

A. Yes, I presume so.

Q. Although your testimony which was received as part of a stipulation is to the effect that they, as a class, desired your methods and knew all about your methods?

34119 A. I don't think I testified they knew all about our methods. I testified that they did desire a delivered price, that we quote a delivered price, but I have no knowledge of whether the dealers, as a class, are familiar with all of our methods of doing business. I don't think they are.

By Mr. MacIntyre:

Q. Well, as to your principal methods of pricing, do you think that they are acquainted with that?

A. Well, I think they are acquainted with the fact that we usually quote a delivered price, and they desire us to do that. I don't think their knowledge goes very much beyond that.

Q. You don't think that they know what you
34120 quote as well as what your competitors quote and make comparisons and know whether or not the prices are identical?

A. They know certainly what we quote and what our competitors quote them, and if the prices are identical, why, they must know that, but I doubt very much if their information goes very much beyond that.

Q. You don't think that they know the reasons as to why they are identical?

A. I am quite sure that in some cases they do not.

Q. And it was your purpose, through this public relations committee, to attempt to educate them as to why they were identical in such cases as they are identical?

A. Well, to whatever extent the Public Relations Committee approached the dealers, I think that would be true.

Q. That is, to educate them from the point of view of the Public Relations Committee; is that correct?

A. Yes.

Q. Mr. Porter, you have stated on direct that your company continues to follow some but not all practices which it followed during the period of the N. R. A. Will you please specify those practices which it does not now
34121 follow and which it followed under the N. R. A.?

A. Did I make that unqualified statement? I thought I qualified that to the best of my belief that that was the case.

Q. Well, what are the facts? Do you know of any practices that you followed then that you don't follow now?

A. Well, the facts of the matter are that I don't remember the—I don't remember in detail the practices that were established under the N. R. A., and I don't remember in detail the practices that we followed since then.

Q. Well, we will get away from the details. What about generally? Do you know any general change in practice?

A. No, I couldn't specifically name any change.

Q. So we take your testimony that you don't know of any changes, then?

A. Well, I don't follow those changes in selling policy. I am still of the opinion that there have been some changes, but I can't just specifically name them.

Q. What is the basis for your opinion on that?

A. Well, just that there have been a good many changes in our selling practices over a period of years.

Q. Do you know of any difference in the practices that are recommended in the Compendium of the Cement Institute, in this record as Commission's Exhibit 561, from the practices that you used during the Code period and
34122 practices that you have used since the Code period?

A. Mr. MacIntyre, I am not at all familiar with that Compendium. I may have read it through at the time, but I don't even know that I did that. I certainly paid very little attention to it. I am not very much interested or concerned with the details of marketing practices, and I never compared that Compendium with our practices or the N. R. A. practices.

Q. Calling your attention, Mr. Porter, to Respondents' Exhibit 2403-B, in the third line from the bottom, concerning a price advance that your company made on August 2, 1932, of 29 cents per barrel, can you tell me what conditions led your company to make that change?

A. I don't remember that particular price advance, but I am sure that it must have been because some com-
34123 petitor made an advance and we had reason therefor to think that we could get more money for our product.

Q. Calling your attention to Respondents' Exhibit 2399, isn't the date of that price advance as shown on Respondents' Exhibit 2403 the date on which you announced that you would no longer load trucks of your customers at your mill?

A. Yes, the date stated on this announcement is the same as the date given in this letter.

Q. Your competitors, of course, had a like policy with respect to loading trucks as of that date; is that correct?

A. Well, I am sure that when we took our trucking out of our mills it was because competitors had done the same thing; and we felt that we could do it without losing business.

Q. You also felt that you could get the price advance of 29 cents per barrel because your competitors were doing it?

A. Yes.

Q. Referring to Respondents' Exhibit 2403-C, and to a contract designated on that page as "BA-5714, Maryland State Roads Commission," and just beyond the last column, "Blanket contract."

Will you please tell us the type of contract that that refers to?

A. Well, I have never been quite sure of these terms that are used in our sales department, but I understand a blanket contract to be a contract in which we agreed
34124 to deliver a certain amount of cement over a certain period of time, the destination and the specific jobs on which the cement is to be used is to be given to us later.

Q. That is, you didn't know it as of the time?

A. We did not know it as of the time.

Q. And doesn't it also mean, Mr. Porter, that it is a requirements contract for a period; that is, that an agency could order under their contract with you any quantity of cement that they needed for the type of work they were doing such as the road commission?

A. Well, it was—when we entered into that contract, it was with the understanding that it was for road work, but it was not restricted as to the particular jobs; they were to notify us later of the particular jobs on which it would be placed.

Q. You would give them all the cement under the contract that they needed for their road work over the period covered by the contract?

A. And up to the amount stated in the contract.

Q. Can you see any difference in that type than the one that the Government proposed under its Good Friday bid, Commission's Exhibit 1339?

A. Well, I thought that there was considerable difference. I thought that the Government proposed to take this cement without at any time notifying us where they would want to use it.

34125 Q. Well, the only difference there is that the Government, the Federal Government, wanted it under that proposal f.o.b. mill and under this proposal they would give you the destination; isn't that correct?

A. Yes, under this proposal they would give us the destination. Under the—

Q. Now, is there any other difference?

Mr. Werle: Let the witness finish his answer, please.

Mr. MacIntyre: I thought he had.

A. (Continuing) And under the Government's proposal, it was my understanding that they did not propose to give us the destination, and that was just the difference. And under this proposal there was no possible conflict with our dealers. Under the Government proposal there was a possibility of a conflict with our dealers.

By Mr. MacIntyre:

Q. You don't think that your dealers cared for this business that the Maryland State Roads Commission was doing; is that correct?

A. It is my recollection that it was not at that time customary to sell Maryland State Roads cement through dealers. I am not entirely clear on the conditions at that time. I presume from what I see there that the State at that time was buying direct. If that is so—if that was so, the
34126 dealers had no occasion to figure in the picture.

Q. Well, what more occasion did they have to figure in the picture cement that the Federal Government wants to buy direct than they do in cement that the State of Maryland wants to buy direct?

A. Well, maybe they don't, but the fact is that they do sell the cement for a lot of small work that the Government does, such as W. P. A. work, and, in fact, the dealer service is necessary to the Government on a considerable part of such work.

Q. The size of the project or the volume of the cement involved is not the controlling factor, is it?

A. No, I don't think the size; it is a question of size and location.

Q. (Indicating) Showing you Commission's Exhibit 1394—

(Witness examines document.)

Q. —that called for a bid on a rather restricted quantity, did it not, f.o.b. your mill?

A. I have never seen this before, so far as I know.

Q. Mr. Werle showed it to you on your direct examination.

A. Did he?

Q. You stated to him why you did not want to bid on such a project, I believe.

A. (Witness further studies document.) Is this the second of those famous proposals?

34127 Mr. Werle: I think that you could identify it for the witness a little better, Mr. MacIntyre, and save him the trouble.

A. Yes, I believe it is the second of those two proposals on which I testified.

May I have the question.

Trial Examiner Norwood: Read it.

(Last question read as follows:

"Q. Showing you Commission's Exhibit 1394, that called for a bid on a rather restricted quantity, did it not, f. o. b. your mill?")

A. Yes.

By Mr. MacIntyre:

Q. Why didn't you bid on that?

A. For the same reason, because we had no assurance that we would not get in trouble with our dealers if we did.

Q. Now, Commission's Exhibit 1063 shows you got an invitation to bid f. o. b. mill on 1,600 and some barrels of cement for use in Rolling Fork, Miss. Do you have any dealers in Rolling Fork, Miss.?

A. No, we do not.

Q. Why didn't you bid f. o. b. mill on that invitation?

A. It is not our custom to bid on jobs so far away from our plants.

Q. Well, this cement, though, the Government
34128 wanted f. o. b. your mill for use in Rolling Fork.

A. Did the proposal state that it was to be used in Rolling Fork?

Q. I believe it did.

A. Well, if that's the case then I have no doubt that the proposal was thrown into the wastebasket without any further consideration.

Q. You just did not give it any consideration because it was calling for an f. o. b. mill bid on cement that the Government might want to use in Mississippi; is that correct?

34129 A. Well, I have no knowledge if we even received the proposal; but if we did and did not bid, then it was not because it was calling for an f. o. b. mill price, but because it was so far out of our territory that we did not think it was worth while paying any attention to it.

34140 Q. Mr. Porter, I am calling your attention to the question and answer appearing from line 6 to 12, page 33955, and I will ask you to state what service you had reference to; that is, the nature of the service that you had reference to at that particular point?

A. I had in mind engineering and chemical service.

Q. I will ask you this: Do you render such service to

any of your dealer customers which is any different from a like service rendered such dealer customers by your competitors?

A. It is very seldom that we have occasion to render those services to dealer customers, but to answer it as to the few cases which it does occur, I would have to know what competitors you refer to.

Q. Well, your answer wasn't restricted to any competitor or customer there on the page that I referred to, was it?

A. No. You want me to answer that as to other customers?

Q. I am talking about as to all customers.

A. All right.

Q. No, as to the dealer customers.

A. The dealer customers?

Q. Yes.

A. Well, I suppose there have been cases where we have rendered such services to dealer customers, and I
34141 would say that there was some of our competitors who do not render such services, and other customers who perhaps do render such services that are somewhat similar to that, although the service varies in each individual case.

Q. Can you cite now, Mr. Porter, any instance in which you have rendered a service of that character to a dealer that was any different from the service that was rendered by your competitors to such a dealer?

A. Well, if I could remember a specific instance where we had rendered such service to a dealer, I am quite sure it would be different from any similar service rendered by a customer because each of such services is an individual case. There are no two of them that are alike.

Mr. Werle: Excuse me—

By Mr. MacIntyre:

Q. I am asking you if you can—

Mr. Werle: Excuse me a minute.

The witness said "rendered by a customer." I think he meant "rendered by a competitor."

The Witness: Rendered by a competitor. Pardon me.

By Mr. MacIntyre:

Q. Can you recall any instance where you have rendered such service to a dealer?

A. No, I cannot. These services are usually not rendered to dealers but to other classes of customers.

34142 Q. Yet your testimony, or this stipulation, which was adopted as your testimony yesterday, goes on to state that your sales, 84 percent, are made through dealers; doesn't it?

A. That is quite true, but that cement is not used by dealers; it is used by consumers who buy through dealers, and usually these services are rendered to the consumers of cement and not to the dealers who handle it.

Q. So your customers, the 84 percent of your customer dealers, do not get services any different from those that your competitors render, so far as you know or can tell us now?

A. Well, only in this way: That when we render a service to a customer of a dealer, that helps and pleases the dealer, helps to strengthen our relations with the dealer.

Q. Can you cite any instance where you have rendered any service of that character to a dealer's customer that was any different from a service rendered by a competitor?

A. Well, I can only say, as I said before, that each of these services is an individual matter. I am sure that every service that we render—

Trial Examiner Norwood: Those services might be called for and might not, after the sale, without the customer knowing that it was going to be called for; is that right, or not?

The Witness: Without the dealer knowing—

Trial Examiner Norwood: Yes, without the dealer

34143 knowing.

The Witness: Yes, it might be in some cases. Sometimes the request comes through the dealer; sometimes not.

Trial Examiner Norwood: Well, in those cases, I want to know to determine the relevancy of any more of this, would in any of those cases any services be reflected in the price? Would the price be any different?

The Witness: No, the price wouldn't be any different.

Trial Examiner Norwood: Yes.

The Witness: This is an added consideration that they get for the price.

Q. Mr. Porter, you said something on your cross-examination about this public relations committee. You said something like this: "To whatever extent the public relations committee contacted dealers."

Do you know whether or not the public relations committee actually did contact dealers at all?

A. I don't think they did at all. The public relations committee did very little, as a matter of fact, outside of that series of advertisements.

Q. This morning the Examiner, I think, asked you a question as to the f. o. b. mill features of this Procurement Division invitation of April, 1938.

Will you tell us as to that the extent to which the f. o. b. mill feature of that invitation influenced your decision not to bid?

34146 A. We had no objection to the f. o. b. mill feature as such. It was only the effect of that on our dealer relations. We were perfectly willing to bid f. o. b. mill provided it could be hooked up with certain other conditions which would protect our dealers, our dealer good will.

By Mr. Werle:

Q. Will you tell me whether or not the same thing was true, or whether there was something different in connection with the subsequent Procurement invitation in May, 1938?

A. Yes, the same thing held true for that.

34148 Q. Now, I want to show you this Burns and Clark questionnaire answer, Mr. Porter. I believe that your same answer appears on Commission's Exhibit 969-4-K, 5-N, and 5-Z. This question that Mr. MacIntyre called your attention to, will you look at the answer to that question in connection with the reason for abandoning trucking and tell me what you meant by the statement that appears there in that questionnaire answer?

A. Well, I—I think what I have said there is obvious, that we couldn't calculate a delivered price if we didn't know the point of consumption, and we, as I said before on examination—we felt that we must protect our dealer on the delivered price.

34149 Q. Mr. Porter, on cross examination Mr. MacIntyre asked you something about publication of your prices, and you referred to certain prices that you don't announce to all of your customers. What prices were you referring to in that connection?

A. Well, there have been instances where we have made special prices for various purposes and have not made them general to all customers, have not, therefore, announced them openly.

34153 WALTER C. RUSSELL, called as a witness for the Respondents, being first duly sworn, testified as follows:

34154 *Direct Examination by Mr. Withrow:*

34155 I am the vice-president and general manager of the Peerless Cement Corporation. The Port Huron plant is not dismantled, never has been dismantled since it was first built in 1923 or 1924. I am not sure 34156 when it was completed. We operated that plant in 1937 and 1938. It is in condition to be operated again if Peerless should decide to do so. The only reason that we are not operating at the present time is because we are able to manufacture at our Jefferson Avenue plant in Detroit sufficient cement to meet all the requirements of our sales, or, to say that in another way: we are over-capacitated for the amount of cement that we can sell at the present time.

34158 The witness identified Resp. Ex. 2405 A to D as material prepared in his office under his supervision. He has examined the contents and can vouch for the substantial accuracy of the contents but there might be an error of a few months in some of the dates set forth. 34159 It represents his best recollection and the best records which Peerless has in the office as to the dates. Regarding accuracy he would not want to specify any particular time was necessarily within a few months of that time on those records.

34162 (RESP. EX. 2405-A to 2405-D was offered and received in evidence.)

34163 Trial Examiner Norwood: Now, does that exhibit include the names of all mills that have been discontinued in the last 10 years, or what?

The Witness: This exhibit that I was referring to in answer to his last question shows the names and locations of the mills that were in existence in 1920.

Trial Examiner Norwood: And who have gone out of existence?

The Witness: Not all of them have gone out of business since. Some of them have been expanded and some of them have been scrapped; and they are both included in this list of 1920.

34168 "Q. Can you tell us whether or not the mills in Michigan at that time were able to completely satisfy the demand for Portland Cement in Michigan?"

Trial Examiner Norwood: Now, answer that from your own knowledge.

A. If I understand the question correctly, you are referring to the year 1920?

By Mr. Withrow:

Q. '20 and '21, yes.

A. If you include the year 1921 as a period of two years, '20 and '21, there began to be a serious shortage of cement in the latter part of 1921 based on orders that were placed in '21. My personal recollection doesn't give the exact time as to when that shortage became effective, but it was right close to that time.

May I state, when I refer to capacities of plants, my statements will probably not agree with the figures of Bureau of Mines or other governmental data because they quite often are at variance with what we call in the industry effective capacities, and when I speak of industry, I mean the construction industry.

Q. And by "effective capacity," what do you mean?

A. I mean the amount of cement that can be delivered to the trade in a given period of time; namely, a construction season, which may be quite often less than the

34169 rated capacity of a mill or of a group of mills.

Q. Now, this Exhibit 2405 shows that a number of new mills were built. Could you tell us approximately what the capacity was for these mills in Michigan by 1926?

A. That capacity was approximately 15½ million barrels by 1926 or '27, about that time. That 15½ million barrels would be according to the Bureau of Mines and

other published records. I don't think that the effective capacity of the mills then in existence in Michigan probably ever exceeded thirteen or possibly fourteen million barrels. The actual consumption in the State in those years got up to, I believe, 13 million barrels, and some of that came in from outside sources.

Q. So that there was an increase in the productive capacity and also an increase of demand for Portland cement over that period in Michigan?

A. That is right.

Q. You mentioned a shortage of cement that started in 1921. Was that an acute shortage?

A. If you by the use of the word "acute" mean that a contractor or a user of cement had considerable difficulty in getting delivery on cement to fulfill his requirements, there was an acute shortage in that period, and I would like to make that 1920, '21, and '22. It varied up and down through the three-year period rather than a two-year period.

Q. I notice from this exhibit, 2405, that starting 34170 with 1927 a number of mills were discontinued.

Can you tell us if you know whether during that period any of the other mills were enlarged in their productive capacity so as to offset the plants that discontinued operations?

A. You mean mills that were enlarged?

Q. Yes.

A. The property of the Huron Cement Company at Alpena in the period from 1920 or '21 up to the present time has continually been enlarged or improved in such a way that the capacity has increased greatly over what it was in 1920 or '21, and I am not personally familiar with what the exact capacity is at the present time. And some of the other mills that were in existence in 1920 or 1921 may have been improved, but I believe only the Wyandotte plant of the J. B. Ford interests would be one of those that was improved.

Q. And the Wyandotte plant is connected in some way with the Huron people?

A. Yes, with the exception of the Alpena plant and the Wyandotte plant, and, possibly, the Cement City plant of the present Consolidated Cement Company, I believe that practically all of those plants listed as of 1920 have either gone downhill or been discontinued.

Now, when I say "downhill," I believe their capacity has been curtailed either because of equipment wear-
34171 ing out or obsolescence of methods or depletion of their sources of raw material for one reason or another. With those exceptions, I think they are—had their capacity depleted.

Q. I believe you indicated, Mr. Russell, that your main mill was in Detroit at Detroit, Mich.; is that correct?

A. One of our mills is in Detroit. Whether or not you can call that the main mill, I am not in a position to say. Under certain circumstances it might be a main mill and under other conditions of wages and taxation, it might not be a main mill.

Q. Have you ever considered distributing cement around the Great Lakes from Detroit by boat?

A. We have made a careful study and analysis of that method of distribution of the finished product to find out if there were any advantages to be gained by our attempting to do it in that manner.

34175 Q. Did you participate in this survey, Mr. Russell?

A. Yes.

Q. Would you tell us just briefly, outline it, what
34176 the results of that survey showed?

Q. Will you tell us how you made this survey, Mr. Russell?

A. This survey, as you call it, or study, as I call it, came about from the fact that in 1933, very shortly after I became receiver of this company, among the problems that I had to solve was one involving the use of three pieces of marine equipment which had been purchased by the old company for the purpose of distributing finished cement around the Lakes. Something in excess of $150,000 had been invested in this equipment. It was lying idle; it was costing money for insurance and was giving no returns. A careful study of the effectiveness of this equipment
34177 convinced me that it could never—

Q. Would you just tell us what you did, Mr. Russell.

A. I instructed the employees of the company to collect certain data that I knew was necessary to draw intelligent conclusions. That data involved studies of the population of the area, the marine equipment that was available on the Lakes, the marine equipment that we had, the

costs of insurance, the period of time that the equi-
34178 ment could be effectively used, investments, and a large volume of data that we brought down and studied and from which we drew conclusions.

That was what I attempted to outline when I first talked about the marine equipment that I found, and I am sorry that I—

Trial Examiner Norwood: That is all right.

A. —started to answer it as I did the first time.

By Mr. Withrow:

Q. Will you tell us, briefly, Mr. Russell, what considerations you gave to these various factors you have named, such as, first of all, your marine equipment.

A. Well, in studying whether or not marine equipment would pay, you first must know how much it costs to operate it, how much it has to do. I gave consideration to those—

34181 A. I gave consideration to those factors. It is difficult for me to complete this without making a statement that we do have marine transportation through the equipment that we now get contract stone on, and our production is part way on its way from the quarry to the market before we process it into cement, so it cannot be said that we are not using marine equipment to deliver our finished product from the point of origin.

By Mr. Withrow:

Q. By that, you mean not from your mill but from the quarry site?

A. That is right.

Now, in the study that is under discussion, we gave consideration to all of those factors and set them down. I believe that we have some data here, or I have it at the hotel that would show how that study was made and the conclusions that were drawn.

Q. What conclusions did you reach with reference to trans-shipment from Detroit?

A. We reached—

34182 Mr. Wooden: I object, Your Honor, as I stated I would, on the ground that he is seeking to give a conclusion without providing the data upon which it is based.

Trial Examiner Norwood: The objection is sustained.

34183 By Mr. Withrow:

Q. Mr. Russell, will you tell me why you don't trans-ship Portland cement from Detroit to other points around the Great Lakes?

A. Because we can deliver it to our customer at the point of use cheaper than we could by the use of boat transportation, or some other method, around to a silo or warehouse and back to the customer.

Q. Have you ever had any agreement with any of your competitors not to go into the business of shipping on Lakes, shipping cement on the Lakes, by water?

A. No.

34184 Q. Is the location of your mill at Detroit as compared with the location of your mill at the quarry where you get your limestone any special advantage to the Peerless Company?

A. I believe that the location of a mill in a metropolitan area, or an area where there is a heavy population concentration, has several advantages. It also has several disadvantages.

Q. Would you enumerate those?

A. One of the advantages of being located in a metropolitan area as we are is that your finished cement as it comes from the mills and is placed in the silos is much nearer the mass consumer than it would be if it were finished at a mill located at the quarry, and the cost of transporting the finished product is less if it can be transported a shorter distance. That is one of the principal advantages; that is, that particular advantage combined with the cheap freight on moving the raw material from the quarry to the mill at the population center.

Q. That is, by boat, you mean?

A. By boat, as we do.

Among the disadvantages are high property tax rates and high wage rates. Those have a tendency—those two things particularly have a tendency to counterbalance the other very material advantage, and it is a continual struggle to balance the two factors against the one. Now,

34185 those three things that I have mentioned are the principal factors involved. There may be some others.

Q. Do you secure your clay for manufacturing cement at Detroit, right at Detroit?

A. We do. That clay has been obtained within a two-mile radius of our plant during the past seven years.

34186 The witness identified Resp. Ex. 2406 as apparently a carbon copy of the data prepared in Peerless office. He can vouch for the accuracy of the figures. It purports to be a tabulation showing the change in cost per barrel from year to year, subsequent to 1927 and up to 1939, compared with the cost per barrel of manufacturing cement in the year 1927, which was taken as the base; it does not show the costs themselves, but shows the changes of cost. The column "Shipments per Barrel" are Peerless shipments, and it also shows sales and shipments in

34187 one column of the tabulation.

Mr. Wooden: Your Honor, we object to the exhibit as incompetent, irrelevant, and immaterial. We object to the column relating to changes in cost since 1927; further, on the ground that the basic data underlying it is not produced. We have no means of checking. As I have already said, it is incompetent, irrelevant, and immaterial. We object to the figures showing shipments unless the witness, and his counsel, are willing to permit the checking of those figures against the figures reported by his company to the Bureau of Mines.

34188 Trial Examiner Norwood: For what purpose are you offering this?

Mr. Withrow: I thought we would get around to that some time.

To answer one of Mr. Wooden's points first, the question of turning over the material at the Bureau of Mines has nothing to do with any of these documents whatsoever. That is the refrain that we hear all the time. The question is what the records of this company show as to shipments.

I am offering this to show the relationship, at least, as shown by the books and records of this company between the manufacturing costs and price, and between manufacturing costs and the volume of shipments of this company. I am also offering it to show that the Peerless Cement Corporation, through the activity of this witness and the company, continually improved its cost picture and reduced costs, and the record already shows that prices during that period in the State of Michigan were very substantially reduced. For all these purposes I think the document is relevant and material, and this witness is familiar with

these figures. These are figures that the witness has worked with, himself, and can testify about.

34189 Trial Examiner Norwood: It has something to do with some set of figures that are not present here.

Mr. Withrow: This came from the books and records and personal experience of this witness. They have nothing to do with the Bureau of Mines.

Trial Examiner Norwood: Are they open to examination?

Trial Examiner Norwood: Of the Federal Trade
34190 Commission.

Mr. Withrow: The books of every company in this industry have been open to the Federal Trade Commission from time immemorial.

Trial Examiner Norwood: Now, I want to know, and probably this witness can tell us whether or not the data contained in this exhibit can be checked from the reports of your company sent to the Bureau of Mines, and which are confidential reports and subject to your release. Is that so or not?

The Witness: I believe that those figures of shipments would agree with the figures sent to the Bureau of Mines.

Trial Examiner Norwood: Yes.

34191 The Witness: Although I should state that those figures are probably not consolidated in that form by the Bureau of Mines.

Trial Examiner Norwood: Yes.

The Witness: Because they include the reports of Portland cement, high early strength cement, and mortar shipments.

Trial Examiner Norwood: Yes, but by checking there it could be determined—

The Witness: I believe it could.

Trial Examiner Norwood: Pretty accurately?

The Witness: I believe it could.

34193 Trial Examiner Norwood: But I shall not receive it in any view of the case unless the supporting data is available.

So I shall sustain the objection unless the company is willing to release that information in the Bureau of Mines (referring to Respondents' Exhibit 2406).

Mr. Withrow: Your Honor, this has nothing to do with the Bureau of Mines. The information is in Detroit, in the annual reports of this company.

34194 Trial Examiner Norwood: Well.

Mr. Withrow: And it is available for the Commission to check.

Trial Examiner Norwood: Bring it in.

Trial Examiner Norwood: It is a tabulation there. In other words, it is the same thing as if the witness were asked to testify to a conclusion without giving the basic facts. That is the basis that it is on.

Well, go ahead. The objection is sustained.

By Mr. Withrow:

34195 Q. Mr. Russell, do you vouch for the accuracy of this document, Respondents' Exhibit, for identification, 2406, that we are discussing?

Trial Examiner Norwood: He said he did, I think.

A. I want to make sure that I know which one you are discussing.

(Counsel hands Respondents' Exhibit, for identification, 2406 to the witness.)

(Witness examines document.)

A. Yes, I vouch for the accuracy of that.

Mr. Withrow: Well, I re-offer it, Your Honor, pursuant to the stipulation made at record page 1613.

34197 Mr. Wooden: I repeat the objection that I have previously made, Your Honor.

Trial Examiner Norwood: Yes.

34198 Trial Examiner Norwood: The objection is sustained.

34201 Washington, D. C.
Friday, March 8, 1940.

34202 Trial Examiner Norwood: Call your witness.

In the failure of Counsel to stipulate as to certain routine facts here, I request the Respondent to comply with my previous order and request that he submit a written offer of proof with respect to this witness and any other witnesses.

Are you prepared to do that or not?

Mr. Brick: If Your Honor please, we have considered that in the light of the two previous statements which Your Honor made, and I would like an opportunity to state our views on it.

Trial Examiner Norwood: Yes.

34203 Mr. Brick: And since Your Honor has referred to the inability of Counsel to reach an agreement

on a stipulation, I would like to have marked, not to be offered, but just to have marked the stipulation which we proposed on behalf of the Peerless Cement Company, and that being the stipulation which was rejected by Mr. Wooden. In other words, if Your Honor is going to make reference to inability of Counsel to stipulate, I want to be in a position to argue, if necessary, that that inability is on the side of the Government and not on the side of the Respondents.

Trial Examiner Norwood: That is not at all necessary. I haven't stated whose fault it was or whether it was any fault of anybody; in fact, it isn't, that we have failed to reach an agreement. It has nothing to do with the record, and the paper may not be marked.

If the Counsel wants to offer that proposed stipulation to me to be considered as an offer of proof with respect to this witness, why, I will take it and consider it as such.

Did you wish to do so?

Mr. Brick: I wish to make this statement, if Your Honor please—

Trial Examiner Norwood: Wait a minute. Answer my question, please, sir.

34204 Mr. Brick: Will you please—

Trial Examiner Norwood: Will you offer this proposed stipulation to me in lieu of this requested written offer of proof?

Mr. Brick: Well, that is impossible, if Your Honor please, because it wasn't prepared to be an offer of proof. It can't be in lieu of an offer of proof; it is an offer to stipulate what the testimony of the witness, Mr. Russell, would be.

Trial Examiner Norwood: You offered it to me and I have examined it. It contains a very full and complete statement of what you propose to agree that this witness would testify to. I say I would be willing to receive that in lieu of this requested offer of proof.

Mr. Brick: I can appreciate—

Trial Examiner Norwood: Now, you refuse to offer it in that way and you also refuse to submit the written offer of proof; is that right? We ought to get that straight before any statement is made.

Mr. Brick: Yes, I can get it straight if Your Honor will get our action stated on the record correctly. We offered a stipulation with respect to a part of the testimony of the witness, Mr. Russell.

Trial Examiner Norwood: Yes.

Mr. Brick: Now, that is only a part; it would
34205 constitute probably at least one-half of his oral testimony if we didn't have the benefit of the stipulation.

Trial Examiner Norwood: Yes.

Mr. Brick: Now, how can we make an offer of proof with respect to what we expect to show through the witness, Mr. Russell, by giving you only the stipulation? That constitutes only a part of his testimony.

Trial Examiner Norwood: Well, would you—

Mr. Brick (Resuming): It is not an offer of proof, so we cannot hand it to you as an offer of proof.

Trial Examiner Norwood: I see.

Mr. Brick: We have handed it to you as a stipulation, because it is a stipulation.

Trial Examiner Norwood: Well, now—

Mr. Wooden (Interposing): It provides for a certain thing.

Trial Examiner Norwood: If they will do that— Will you give us your written stipulation—written offer to proof—with respect to this witness?

Mr. Brick: Well, now, in connection with that, I think it proper for Your Honor to have our views.

Trial Examiner Norwood: Yes.

Mr. Brick. And we have studied the record with respect to the suggestions made by Your Honor in that regard—

34206 Trial Examiner Norwood: Yes.

Mr. Brick: —on the two other occasions. Now, I did not interpret those as orders or directions; I thought they were suggestions.

Now, since Your Honor has requested Counsel for the Respondents to consider the submission of an offer to prove to Your Honor, and Counsel for the Commission, with respect to each witness, prior to his taking the stand, I believe that Your Honor should know our views concerning such offers.

First, I would like to mention that Counsel for the Respondents are in sympathy with any action which will properly expedite the case. The record shows that contributions to this end have repeatedly been made by Respondents, not only in the course of presenting their defenses but during the course of the Commission's case. I refer,

in part, to our many objections and motions to strike, all of which were made in the effort to prevent an unnecessary broadening of issues, and to eliminate from the record evidence which was not directly relevant to the Commission's case; but which, however, would require the production of proof by Respondents.

Our efforts in this direction were unsuccessful, and as a result each Respondent has been forced to meet con-
34207 siderably more than fifty thousand pages of evidence, including both testimony and exhibits, admitted on behalf of the Commission.

Now, we regret that this is a long case, but under the circumstances and the state of the record we cannot agree that the responsibility for its length lies with the Respondents. We have offered several stipulations, and some have been accepted by the Commission's Counsel. We propose offering further stipulations, wherever possible, particularly when positions of some Respondents may be similar on the same topic of evidence. As in the past, we propose to seek concessions when we believe that concessions are appropriate and will assist in limiting our proof.

Now, as to the submission of offers of proof of the character described by Your Honor, we believe that they would serve to delay rather than expedite the hearings. The burden of preparing such offers would be tremendous; they would only be useful to the extent that they were rejected, and would then constitute the only record of a witness' testimony. The care and completeness which would be required for the proper preparation of such important documents would make it necessary to devote much more time to their preparation than to the examination of the witnesses. From a time standpoint, among others, they would impose an impossible burden on the Re-
34208 spondents, one which they could not perform even though they overlooked the extreme prejudice which might be incidental to them.

It should be recalled that Counsel for the Commission have on several occasions made demands for our trial briefs under the guise that they were necessary for cross-examination of Respondents' witnesses. We did not comply because there was no legal justification for the demands having been made, and because, under no circumstances, was the Commission entitled to our working papers. In giving Commission's Counsel complete offers

of proof as to each witness we would be tendering to them even more than they would have received had we submitted our trial papers pursuant to their groundless demands. Furthermore, to require the submission of offers of proof under the conditions which have been suggested would have the legal effect of requiring each Respondent to show cause why it should be entitled to exercise its right to call witnesses on its behalf.

I have no doubt that Your Honor agrees as to this effect, and also that such a requirement would be repugnant to all rules of procedure. While it is impossible and impracticable for us to undertake preparation of written offers of proof for each witness in lieu of his appearance as a witness, we will make use of stipulations and con-
34209 cessions wherever possible, and will confine our proof to what we consider essential items of evidence. We trust that on this basis, and with some cooperation from Counsel for the Commission, and Your Honor, we may proceed with fewer interruptions than we have encountered heretofore.

That, sir, is our position with regard to the offers.

Trial Examiner Norwood: That is all very well taken. I have said heretofore that in cases where it might prejudice the Respondents—

Mr. Brick: Yes, sir.

Trial Examiner Norwood: —I would not insist on this; but the fact stands out that you have unnecessarily gone into details in presenting some of this particular evidence, and it has lengthened these proceedings to a point where we have to exercise a much greater discrimination.

Now, in requesting those written proffers I think I suggested that it be confined to certain points which were amply covered, and which the Counsel for the Respondents, being skilled and experienced lawyers, could easily tie in Respondents who have not yet been heard from, that is, with a few questions, instead of going over pages and days to bring out details which are perfectly familiar,
34210 and those subjects on which I should like to have written offers of proof are the matters which involve the Respondents picking up prices at destination points through their own salesmen and customers; meeting prices at these points; and calculating back to basing figures in order to anticipate prices at other points in contiguous territory; announcing own price changes

through printed notices to customers and instructions to salesmen; and prices met generally conform to a basing price or basing figure plus freight from a basing point, and that they sell only on delivered prices except where they sell with the control clause; and that many dealers request destination prices; and that the greater part of manufacturers' business is through dealers, and the dealer policy is based in part on this consideration, and that the Respondents determine freight from an Institute freight book, and that they often check these with the railroad rates, and the Respondent does not desire to underbid his competitors, and cannot get business by charging more, and also the various reasons for their methods in announcing their policies and in announcing their prices, and their various reasons for their attitude of trucking, and numerous thing like that it is a waste of time to go into in detail hereafter.

Now, if you have any new methods, or, as I say, evidence that replies specifically to matters already in
34211 evidence as against particular Respondents, you may go into it, and you may, of course, make record statements from Respondents concerning these matters; but we are not going to go into these unnecessary details any further, and your failing to comply in future with my request is going to be considered, and I think it will evidence a lack of cooperation on your part in the matter of expediting the hearings.

Mr. Brick: Well, in that connection, if Your Honor please, I am sure there will be no evidence of a lack of cooperation on the part of Respondents. I think that we will have to bear in mind two important points, one is that in principle Respondents are in entire agreement with Your Honor, and in connection with the items which Your Honor has indicated as being suitable subjects of agreement between Counsel for the Commission and Counsel for the Respondents I must say, first, that Counsel for the Commission have stated that they do not desire to stipulate any facts in the case; that—

Mr. Wooden: That is not true.

Mr. Brick: —and I am not suggesting that that is unreasonable. That is, they have said as a matter of practice they do not think they would be appropriate, and we have not given it any further consideration.

Trial Examiner Norwood: Yes.

34212 Mr. Brick: Now, the second point is that with regard to each of the items mentioned by Your Honor, we have covered those by stipulations since Your Honor made that suggestion, and with respect to each of the witnesses whom we have offered since Your Honor made that suggestion originally—I think it was off the record—we have offered stipulations covering those subjects, and those are the subjects which are included in the stipulation which we offered on behalf of the witness Mr. Russell this morning, and which was rejected by Counsel for the Commission.

Now, there is complete agreement between Your Honor and Counsel for the Respondents.

Trial Examiner Norwood: Wait a minute. You coupled that with certain conditions here. I don't want any argument to go on here that one side or the other side is responsible for a failure to enter into an agreement.

Mr. Brick: No, I don't think that should be—

Trial Examiner Norwood: Some of these have been acceptable and some acceptable ones may have been rejected, but there are certain stipulations—certain conditions attached to some of these that the other side will not accept and we shall forget that. I am just asking you what I think that you should, if you are going to cooperate with me, furnish me. As to the Counsel on the 34213 other side, that is another matter.

Mr. Brick: I know. If we are going to have any discussions, if Your Honor please, with regard to matters relating to cooperation, good faith, and responsibilities or obligations on the part of any of us, that is, on the part of Your Honor, Mr. Wooden, or on the part of us, I do think that if Your Honor begins to put any statements on the record relating to any of those matters, we should have an open discussion of the situation on the record.

Trial Examiner Norwood: Just what are we having now?

Mr. Brick: Your Honor suggests that it was improper for me to mention the stipulation, when I am stating to Your Honor that we have carried out in principle the suggestions which Your Honor made by offering the stipulations which Counsel has rejected. I asked that those stipulations be marked. Your Honor refused to do that, and then Your Honor tried to scold us for not cooperating.

Trial Examiner Norwood: Now, you are entirely mis-

taken about me scolding anybody. You made those statements on the record.

Mr. Brick: I am glad I am.

Trial Examiner Norwood: Yes, you are entirely mistaken.

Mr. Brick: I will be glad to withdraw that state-
34214 ment on Your Honor's statment.

Trial Examiner Norwood: Well, I appreciate that. It wasn't necessary. This is a matter-of-fact discussion.

Mr. Wooden: Your Honor, in view of Mr. Brick's statements regarding our inability or failure to stipulate, I think I am entitled to say something on that score myself.

Trial Examiner Norwood: Well, it was skillfully, you might say, slidden into here, and we are into it.

Mr. Wooden: I pay great tribute to their skill in all of these matters.

Trial Examiner Norwood: I will ask Counsel to make it as short as he can.

Mr. Wooden: It is simply this, Your Honor: That during the course of the oral testimony last fall on the record we frequently offered to stipulate. The stipulations were rejected on certain particular subjects. We offered at the same time to offer no objection to their putting in anything that was different that had been previously shown over and over again. Along comes the Christmas holidays. We then proposed in writing a stipulation regarding certain subjects which had been gone over and hashed over and rehashed over innumerable times. We couldn't get any
results. But we didn't put our efforts on the rec-
34215 ord. Respondents come back after the holidays and they propose a counter-stipulation, and they put it on the record and since then it has been a jockeying for position as to which side is to blame for the failure of the negotiations.

Trial Examiner Norwood: Yes.

Mr. Withrow: Everybody else has had their say, and I would like to say one thing: That my recollection of the situation after Christmas was just one thing. Mr. Wooden thought his stipulation was so good that he offered it in evidence, and we asked to have our stipulation marked today and we couldn't even have it marked.

Trial Examiner Norwood: No, you both have had stipulations offered in evidence. I think there is no issue as

to responsibility for failure of stipulation here, but I am just making my statements this morning to explain in a way my future ruling, to explain the necessity for exercising a great deal of discrimination in what we receive hereafter. Anything of value to the Respondents I shall receive, but if it is merely cumulative, and on these points that I mentioned there, if it is detailed matter, I am going to exclude it and ask you to put it in in a more concise form. Now, if you are not willing to put it in writing, as I have requested, I will notify you that you will have to put it in more concise form.

34216 Mr. Brick: I wonder, if Your Honor please, as to those matters which Your Honor suggested as being proper subjects for some kind of agreement—

Trial Examiner Norwood: Yes.

Mr. Brick: —I wonder if we could, in connection with these matters, just offer for the record a previously prepared written statement of the witness concerning these items and hand them to the Reporter and permit them to be incorporated in the record as the testimony of the witness; that is, limiting it to these subjects which Your Honor has mentioned.

Trial Examiner Norwood: Yes.

Mr. Brick: And giving Counsel for the Commission the complete right of cross-examination and motions to strike on any grounds, and the only condition I think that we would require in that connection would be that if they did make a motion to strike, and the motion were granted, that we could treat the situation orally and more fully than it might have been covered on the stipulation.

I would be glad to consider something along that line.

Trial Examiner Norwood: Well, now, let's make that off the record. That may, and properly would, commend itself to Counsel for the Commission.

Mr. Brick: May I state just by way of correction,
34217 if Your Honor please, in case I was misunderstood, the remarks which I withdrew relating to any statement in reply to Your Honor's statement related only to that part where I mentioned that Your Honor was scolding Counsel for the Respondents. Of course, the rest of it I would want to stay.

Trial Examiner Norwood: Yes.

Mr. Brick: That holds the grounds for our action.

Trial Examiner Norwood: I think that all of you might be scolded at times.

Mr. Brick: Yes.

WALTER C. RUSSELL, thereupon resumed the stand and testified further as follows:

Direct Examination (Continued) By Mr. Withrow:

Q. Mr. Russell, have you ever furnished any information to Mr. Mallory of The Cement Institute concerning the capacities of your mills?

A. I never have, personally, and not to my knowl-
34218 edge has the company furnished information to Mr Mallory.

Q. Has your company ever agreed to restrict production in accordance with any capacity figures of Mr. Mallory?

A. No, sir.

May I supplement that other answer about furnishing figures? I know that we furnished the United States Bureau of Mines' figures, and I know that—

34221 Q. Do you determine the price policy of your company, Mr. Russell?

A. I am finally responsible for it. The price policy is generally determined by the sales manager, but in consultation with myself about important matters.

Q. Is your company a price leader or a price follower?

A. In general we follow prices made by competitors. If that places us as a price follower, it is correct.

Q. Then am I correct in understanding that on occasions you have led on price moves; I mean, you have made price changes?

A. I know of one instance where we initiated a change in price without knowledge of anybody having made a change in existing published price.

Q. Well, will you tell us, did this take place prior to July, 1937?

A. Yes, I know of one instance that it did.

34222 The witness identified Resp. Exs. 2407 and 2408 as documents coming from the files of Peerless. Resp. Ex. 2407 was prepared in the regular course of business. He believes that Resp. Ex. 2408 was received in

the regular course of business in his office from one of his salesmen.

Q. Now, are you familiar with the circumstances surrounding the preparation of Respondents' Exhibit 2407, generally?

A. I remember the time that this happened, and I remember that Mr. Schmutz, who then had charge of the sales and price policies of the company, having previ-
34223 ously advised me about the low prices, asked permission to make this increase, and I advised him that it was all right for him to go ahead, and he did so. I am not sure of the exact time that price changes were made outside of Michigan, which may have influenced Mr. Schmutz in making the price change in our Michigan territory; but there was no prior notice received by us in the Michigan territory.

Q. Well, could you tell us your reasons for making that increase in price in Michigan? That was an increase, was it not?

A. I believe so.

Q. Would you tell us your reasons for making that—initiating that increase in Michigan?

A. Our reason was that the company had lost a great deal of money, and was continuing to lose money, and if an opportunity presented itself to get an increase in price I certainly was going to give the sales manager permission and authority to increase the price.

34224 Q. Is Mr. Schmutz alive at the present time, Mr. Russell?

A. No.

Q. How long was Mr. Schmutz connected with Peerless after you came with the company?

A. He left the employ of the receiver in November or December of 1933.

Q. And the receivership started in May, did it?

34225 A. May 10, 1933.

34229 (RESP. EXS. 2407 and 2468-A, were offered and
34230 received in evidence.)

By Mr. Withrow:

Q. Now, with reference to this price increase that is referred to in those two Respondents' exhibits just received, Mr. Russell, did you enter into any agreement with any of your competitors to make such an increase in price?

A. No.

Q. Now, have you ever led—that was a price increase—have you ever led in a price decline?

A. We have sent out notices that made the price of high early strength cement decline very slightly, that were not followed by other companies. It was two years ago, I believe, the only instance that I know of. It was an attempt on our part to correct some routine pricing matters in our own office.

Q. Have you had, Mr. Russell, any requests from the Federal Government for f. o. b. mill quotations?

A. We may have had some, I believe so; I didn't—

Q. I will show you Commission's Exhibit 1339, and ask you if you recall that invitation (handing document to witness)?

A. Yes, I remember receiving this invitation; if this is the so-called f. o. b. request, why, we did receive this one.

Q. Did the Peerless Company submit a bid in response to that so-called Good Friday invitation?

34231 A. No.

Q. Could you tell us your reasons for not submitting a bid on that invitation?

A. In the first place, as I remember this, and it has been some time, this invitation did not specify where the cement was to be used; how much cement was to be used; when deliveries were to be required, and was merely a request for a bid on a blanket quantity of cement, and I could see no reason why the Peerless Cement Corporation should make a quotation on that basis, because we could certainly not know how to set up a production schedule, how much cement to put in the silos, how some request for shipments might come in to interfere with our shipping schedules, and taking care of our regular customers; in fact, I could see no advantage to the company in bidding on it.

Q. Prior to this Good Friday bid had you ever had any experience in bidding to any of the relief agencies of the Federal Government?

A. We—whether or not we bid to the relief agencies of the Federal Government, we did have experience in 1934 with furnishing cement to a C. W. A. project. I believe that was a direct sale, but I am not certain; it may have gone through a dealer; however, we had considerable trouble getting our money from the material furnished on

that job; in fact, we never did get all of our money,
34232 and that particular experience with the Federal agencies convinced us that business of that type was not desirable for the company, and may have affected my opinion on this other invitation to bid.

Trial Examiner Norwood: Did it?

The Witness: Yes.

By Mr. Withrow:

Q. Mr. Russell, have you ever made any sales to anyone f. o. b. your mill?

A. Yes.

Q. Would you just describe briefly under what circumstances?

A. I remember one instance, 1938. We sold the Ford Motor Company 30,000 barrels of cement.

34236 A. (Continuing.) We received the request from the Ford Motor Company to sell their cement because their silos were getting very low. We quoted them a price, and they asked permission to do their own hauling, and we agreed. I had no objection at all to selling under those circumstances, and they placed the order with
34237 us.

Trial Examiner Norwood: And you did not have the same reasons for refusing to sell Ford f. o. b. that you had for the Government; is that right?

The Witness: The so-called f. o. b. matter pertaining to the Government invitation to bid was of no concern to me in considering that particular invitation.

Trial Examiner Norwood: Well, distinguish between the two situations here so as to make it clear what your policy was; that is, distinguish the Good Friday refusal to bid and your sales to Ford f. o. b. mill.

The Witness: First; the request from the Ford Motor Company was for a definite quantity of cement to be delivered at a particular time. We, therefore, knew the price that we would get, the time that it would be delivered, and could settle our production problems accordingly. The other invitation to bid was for an unknown quantity, although a top figure was mentioned to be delivered at an unknown time, at an unknown destination. We had no way of knowing from an invitation of that kind where that was going in our own territory, or if it was going into our own territory, and how it might affect certain dealer relationships on which we are dependent for an outlet of our prod-

uct. They were very much different in the circum-
34238 stances under which the request was made for a quotation and delivery.

By Mr. Withrow:

Q. When you said "the other one," were you referring to Commission's Exhibit 1339?

A. I was referring to this invitation to bid of April—or Friday, April 15, 1938.

Q. That was the one you were comparing with the Ford?

A. Yes.

34241 Q. Since this experience which you testified to a few minutes ago, about not getting paid on Federal Government jobs, have you actively solicited Government business as compared with your soliciting dealer and contractor business?

A. No; we devote our principal efforts towards getting business from dealers and contractors and private sources.

Q. Do you sell the W. P. A. direct, or through dealers?

A. Through dealers.

34242 Q. Have you ever considered selling it direct, Mr. Russell?

A. Yes; we have given consideration to the problem but have never considered it good business on our part to do so.

Q. Will you tell us your reasons for not selling the W. P. A. direct?

A. It is my own belief that our reason is that the agencies of the Government change from year to year so much, that any attempts that we may make to sell these agencies only have effect for a relatively short period of time. If we can direct our sales efforts through agencies, private agencies, that are going to be relatively permanent and exist over a considerable number of years, then we can gradually build up strength in our business. That is one of my fundamental reasons for soliciting business principally through private sources. We have no objection as such to selling to a governmental agency, but our efforts are not particularly directed to that kind of selling for the reasons I have given.

I might add one other reason—

Trial Examiner Norwood: I think you have answered the question.

By Mr. Withrow:

Q. Tell us what your other reason is, Mr. Russell.

Trial Examiner Norwood: Have you any other reason?

The Witness: Yes.

Trial Examiner Norwood: Or are you just en-
34243 larging on the same reason?

The Witness: I was going to say one other reason.

Trial Examiner Norwood: Yes.

A. The experience that we had in 1934 of selling something over two thousand barrels of mortar cement to be used on the C. W. A. project in Dearborn, Mich. The authority of the Government agency to purchase this mortar expired prior to the time that the mortar could be used in the structure. Therefore, they took delivery and stored the mortar. Subsequently the mortar which had been improperly stored was not fit for use, and an attempt was made to trade that mortar for some Portland cement. We attempted to cooperate but the paper work became so involved that eventually, although we had been paid for a portion of the mortar, we never were paid for all of the Portland cement that was used on the jobs, and the mortar remained in storage, and I don't know how it was ultimately disposed of, but, certainly, it could never be used in the structure. We became discouraged in trying to collect the money and wrote it off.

By Mr. Withrow:

Q. Did you find, Mr. Russell, that the type of business, or type of construction, being done by the W. P. A. in Michigan was the same or different from the type which was normally done by private agencies prior to the depression?

34244 A. The type of business and construction done by the W. P. A. in Michigan was certainly different from the type of construction done by private sources as to method of doing it.

By Mr. Withrow:

Q. Well, as to type of structure—

Trial Examiner Norwood: He is asking you—

A. As to type of structure?

By Mr. Withrow:

Q. I mean the kind of jobs.

Trial Examiner Norwood: He is asking you whether or

not this kind of work—at least he wants to reach this—is the kind that they usually employ cement for bought through dealers.

A. Well, that construction is the same, types of structures, were done both by private parties and by the W. P. A.

Trial Examiner Norwood: Small jobs?

The Witness: Yes.

By Mr. Withrow:

Q. Now, there is some testimony in the record 34245 about a Sarnia Bridge letting. Mr. Russell, will you tell us what you know about the Sarnia Bridge job? Who had the contract?

A. The Sarnia Bridge job involved a number of contracts instead of one contract. I believe there were—I could count them up—but about ten different contracts let on that job. It was under the jurisdiction of an international bridge authority that set up an area on both sides of the river whereby material could be furnished by manufacturers or dealers from either country. We succeeded in selling the various contractors who had work on the American side our cement. We did not succeed in selling any cement on the Canadian side by virtue of the fact that the Canada Cement Company met our price, which was lower than the published price in Canada, and advised Canadian contractors that they would meet or beat any price that we might quote them, and it was Canadian contractors who built the structures on the Canadian side—American contractors who built the structures on the American side.

Q. And you sold cement to a contractor?

34246 A. Yes, correct.

Q. Was there any letting, or any bids turned in by cement companies to these contractors?

A. Not to my knowledge.

Q. Now, did the contractors use your docks at Port Huron in connection with their Sarnia job?

A. One or two of the contractors used our property to store material on, and one of the builders' supply dealers, through whom some of the cement was furnished to a contractor, used our dock for storage of materials. The pier on the American side, or the main pier on the American side, for this bridge, is on our property, and the construction plant of necessity had to be set up on our property, or construction plants, of some of the contractors.

Q. Did you discuss the question of your contract, or sales to contractors, with Ben Calvin before you made that? When you were negotiating with the contractor?

A. No, I did not.

Q. Miss Fowley testified that Mr. Calvin discussed with the Peerless the question of an increase which Aetna attempted in 1936 around Bay City and Saginaw. Would you tell us whether he discussed that with you?

A. He did not.

Q. Do you know whether or not he discussed it with anyone else in the Peerless Company?

34247 A. He did not.

Q. Did anyone in your company ever discuss any such telephone call with you, Mr. Russell?

34248 A. No.

Q. Did your company, or anyone to your knowledge in your company, enter into any agreement with the Aetna Company to follow such a price increase?

A. They did not.

Q. Do you know whether or not your company followed that price increase, Mr. Russell?

A. I believe they did attempt to follow that price increase. I believe that our traffic manager, in the absence of Mr. Luck and myself, who were out of the city, sent out quotations following that price increase.

Q. Do you know whether you were ever able to sell any cement at that increased price?

A. We were not.

Q. Will you tell us why you were not?

A. Because there were one or two—no, or two other companies who failed to send out quotations at the increased prices, and naturally when that circumstance occurs nobody can sell at the attempted increase price.

Q. So you know of no cement being sold at the advanced price?

A. I do not know of any cement.

34249 The witness identified Resp. Ex. 2410 as figures prepared in Peerless' office. He is familiar with the figures generally and can vouch for their accuracy.

34252 (RESP. EX. 2410, was offered and received in evidence.)

34253 Q. Mr. Russell, do you keep records in your office which show the number of barrels shipped by truck, and the number of barrels shipped by rail from your various plants?

A. Yes.

Q. How are those records kept?

A. Those records are kept by shipping sheets maintained by the shipping clerks and sent to the traffic manager who keeps a daily summation of shipments made by truck and rail. He has a regular form on which he consolidates those at the end of each week, and puts a
34253 report on my desk. This sheet that you showed me just now is prepared from those consolidated reports that he makes up at the end of each week.

Q. Now, does this clerk have the regular duty of preparing such daily and weekly reports?

A. Yes.

Q. And are these kept in the regular course of your daily business?

A. Yes, sir.

Q. Mr. Russell, do you allow dealers to come to
34255 your plants and get cement in their own trucks?

A. Yes.

Q. Do you also ship by your own or contract truckers?

A. Yes. May I correct that last answer?

Q. Yes.

A. Your statement, "our own or contract truckers." We have no trucks of our own in which we deliver cement.
34260 The witness identified Resp. Ex. 2411 as a tabulation prepared from the files of the Peerless Com-
34263 pany. This paper was prepared at a time when one of the trucking companies in Michigan, he believes, early in 1938, went before the Public Utilities Commission and made a request that the rates be changed, in the order issued by the Public Utilities Commission changing the rates that were then in existence and filed by the various trucking companies. It was prepared in the regular course of Peerless Company's business and not for use in this case.

Examination on Voir Dire by Mr. Wooden.

34264 The present prices are not based on the rates shown on these tabulations. The prices that were in existence at the time that this was prepared were not based on either the railroad rates or the truck rates. In the Lower Peninsulas of Michigan subsequent to the time this was gotten out, certain prices were established, or came into use, that were based on a portion of the figures

shown on these tabulations. Recently the prices throughout Michigan are based on railroad rates which agree with the trucking rates beyond certain distances. He believes that where they do not agree with the trucking rates, then they are based on the railroad rates, but he is not in
34265 a position to make a definite statement, because the prices have changed so rapidly recently that he can't make a positive statement about that. The figures shown on Resp. Ex. 2411 apply as of the time when the Michigan Transportation Company made its request to the Public Utilities Commission of Michigan. He can't give that date because it is not shown here. He believes it was early in the year 1937 or 1938, but this has been going on for more than a year and a half, and his memory does not serve him as to exactly when it started, a controversy between the trucking company. Prior to 1937, before these truck rates were filed with the Michigan Commission, Peerless based its delivered prices upon rail rates.

Mr. Wooden: Now, Your Honor, I think the irrelevancy of the exhibit has been demonstrated; it has no relation.

Trial Examiner Norwood: The objection is sustained, and I am asking the Counsel—

34266 Mr. Withrow: We would like—

Trial Examiner Norwood: —not to take any more time offering papers like that, unless you can show that the truck rates, prior to the issuance of this complaint, were such rates as delivered prices were based on.

Mr. Withrow: I would just like to—

Trial Examiner Norwood: There is no interest in this thing, unless they were so based.

Mr. Withrow: Well, I would like to have had an opportunity to be heard before Your Honor ruled, but, anyhow, I would like to read a paragraph from the complaint.

Trial Examiner Norwood: Well, there is no use of doing that.

Mr. Withrow: We—

Trial Examiner Norwood: We have had those paragraphs from the complaint.

Mr. Withrow: No, this paragraph from the complaint alleges—

Trial Examiner Norwood (Bringing down gavel): Wait a moment.

Mr. Withrow (Reading from complaint): "That the

shippers monopolized the benefits of cheaper means of delivery"—

Trial Examiner Norwood: Yes, of course.

34267 Mr. Withrow: (Continuing.) "— by not passing on the benefits—"

Trial Examiner Norwood: Yes.

Mr. Winthrow: Now, the question of whether or not it is a cheaper method of delivery, and a comparison of rates shown, whether it was cheaper as far as rates are concerned, that is the question, and the only way we can put that into evidence is by putting in the tabulation as to what the rates were.

Trial Examiner Norwood: You have not shown that they passed on these benefits.

Mr. Withrow: Well, the question, Your Honor, is whether there are any benefits. If the rates are the same there are no benefits, and there is nothing to pass on.

Trial Examiner Norwood: I see.

Mr. Withrow: And I am addressing this exhibit to show whether or not there were any benefits to be passed on.

Trial Examiner Norwood: Please—please—let us not discuss the matter any further (bringing down gavel).

34268 By Mr. Withrow:

Q. Have there ever been any losses or damage of cement in transit when shipped by truck?

A. Yes.

Q. Do you handle the claim with the trucking company or does the buyer handle the claim?

A. We do.

Mr. Wooden: Your Honor, again it is just so patently irrelevant and immaterial. Of course, if they provide the trucker, they guarantee delivery by the truck that they provide, but why do you go into that kind of stuff?

Mr. Withrow: Well, if Mr. Wooden is now willing to concede that the risk of loss on shipments on a delivered price are on the seller and not on the buyer, I think

34269 we can save some time. It has a bearing on what price is and what this witness and his company considers price to be, and I thought that was one of the issues in the case.

Mr. Wooden: I stipulate that wherever a shipper provides the means of his own to deliver that, he is responsible for the delivery.

Mr. Brick: Would that apply, as far as your offer is concerned, Mr. Wooden—would that apply to the contract trucker? I didn't understand your expression "where he supplies the means of delivery."

Mr. Wooden: If my legal opinion is worth anything, I think it would apply to the contract trucks.

Mr. Brick: No, I only mean so far as this case is concerned. We want to find out whether we can eliminate a lot of testimony.

Mr. Wooden: You can certainly eliminate that, and I object to it and say it should be eliminated.

Mr. Brick: As far as your statement was concerned as to what you would be willing to stipulate, when you say that the means of transportation is supplied by the seller, do you include in that the contract trucker?

Mr. Wooden: The contract trucker who is hired by the shipper and paid by the shipper, yes.

Mr. Brick: Well, on that understanding I think we can eliminate a good part of that testimony.

34271 Q. Mr. Russell, do you have a large volume of cement that you ship from your mill? I mean, when the dealers come and get it at the mill? Does that amount to very much?

A. That doesn't amount to any considerable percentage of our business.

Q. You have testified that you trucked cement into Michigan. Did you also truck cement down around Toledo, where you market?

A. Yes.

Q. You do it on the same basis there as you do at Michigan, generally speaking?

A. Yes.

34272 Q. But have you ever had a price or a maximum net at your mill for rail deliveries and then added 15 cents for that in the event delivery was taken by truck?

A. Not to my knowledge, no.

Q. Would you know if they had done that since you have been connected with the company?

A. I believe I would.

Q. Has the Peerless Company ever taken steps with any manufacturer of cement to discourage trucking?

A. No, not within my knowledge, and that knowledge goes back to 1922.

34273 Q. Have you ever entered into any agreement with any of your competitors to discontinue trucking?

A. No.

Q. Have you entered into any agreement with your competitors not to sell to trucks at a plant price or f.o.b. mill price?

A. No.

Q. Does the use of trucking require added investment at your plant in behalf of the Peerless Company?

A. Yes.

Q. Would you tell us briefly what those investments amounted to and what equipment was necessary?

Mr. Wooden: I object, Your Honor.

Trial Examiner Norwood: He is offering this as reasons for opposing the practice of trucking.

34274 Mr. Wooden: They are getting into the subject there of costs, Your Honor, and not merely costs as reflected by truck rates, but as reflected by investment and extra expense in loading the trucks, and all that.

34275 Trial Examiner Norwood: You want to show that here are cases where the advantages were against the rails; is that the idea?

Mr. Withrow: I think that the Commission would like to know whether or not there are any benefits of trucking, and whether or not there are any savings to be passed on, and I am addressing my inquiry to obtaining those facts.

34281 Trial Examiner Norwood: I will sustain the objection.

34282 Trial Examiner Norwood: I think the question of whether or not the mill and the customer profits by any differences between truck shipments and rail shipments is irrelevant, whether or not it ties up to some phrase in the complaint makes little difference.

Mr. Withrow: But how about the thousands of documents on it that they put in?

Trial Examiner Norwood: The thing is that sometimes, I think it is shown that truck costs are more than rail, and in that case the price is based on rail, and some-
34283 times it costs less than rail, and in that case it is based on rail, regardless of the trucking costs. Trucking costs are not in issue, so that I think Counsel may have the benefit of his exception on that, and I suggest that he not offer any more evidence on that subject.

Mr. Brick: I was wondering if I might ask Mr. Wooden if he will concede that where conditions permit, and the cost of trucking will be cheaper than rail service, that where practicable companies take advantage of trucking in preference to rail?

Mr. Wooden: I don't know what you mean by taking advantage. I wouldn't doubt that they make some deliveries by truck.

34284 Mr. Wooden: Here is the situation: The basing point involves on the part of non-basing point mills, so-called phantom freight in adding the freight from the basing point to their nearby localities. When they go into other territories involves the absorption of freight, which is nothing but an expression of the actual freight
34285 being greater than the imputed freight, and the same principle is involved in the trucking, when the trucking rate is less than the rail they have so-called phantom freight, where it is more than the rail they absorb it; but the question is involved there not only of the pricing method, but of whether those two things do not involve price discrimination.

34290 Trial Examiner Norwood: When were these photographs taken?

Mr. Brick: We will have to ask the witness.

Mr. Withrow: We will have to ask the witness.

By Mr. Withrow:

Q. Can you tell us, Mr. Russell?

Trial Examiner Norwood: When?

A. I believe those photographs—if they are the photographs I have seen before—were taken last winter or last fall.

Trial Examiner Norwood: Yes.

I shall refuse to waste any more time on them or permit them to be marked.

Mr. Withrow: Could I ask one more question, Your Honor? I mean—

Trial Examiner Norwood: Wait a moment.

Mr. Withrow: Is that the way the mill looked?

Trial Examiner Norwood: I hope Counsel won't ask any more questions on this particular subject.

Mr. Withrow: I don't know the relevancy of Your Honor's last question, but I would like to find out from the witness whether those pictures represent the way the mill looked on July 1, 1937, and prior to that time.

34291 The Witness: Oh, yes.

Mr. Withrow: And I request again that those documents be marked; they are only four photographs—

Trial Examiner Norwood: Well, we will not—

Mr. Withrow: And we have wasted more time—

Trial Examiner Norwood: We shall not mark them unless grounds are laid to show their relevancy; and they have not been so laid.

Mr. Brick: Your Honor please—

Trial Examiner Norwood: Let us not discuss that any more.

Mr. Brick: Let the record show—

Trial Examiner Norwood: I have made my ruling.

Mr. Brick: I want to—

Trial Examiner Norwood: Wait a moment.

Do not give any instructions to the Reporter as to what the record shall show.

Will you kindly address me as to what the record should show? The record will record any statement you made there.

Mr. Brick: I don't know of any—

Trial Examiner Norwood (Interposing): Do not give your instructions to the Reporter.

Mr. Brick: I do not understand. I do not give instructions to anybody in this room. I am asking you
34292 whether or not the record may show a statement which I want to make, not with regard to your ruling, but with regard to your procedure.

Trial Examiner Norwood: Well, I think you better make these statements regarding my procedure to the Commission or to the court.

Now, I have made the ruling on this and we have been discussing it for some time, and we are not going to waste any more time on it.

Proceed with your examination.

Mr. Brick: Am I instructed not to make a statement?

Trial Examiner Norwood: Yes.

Mr. Brick: Which I think is now proper and relevant?

Trial Examiner Norwood: Yes.

Mr. Brick: With regard to the procedure?

Trial Examiner Norwood: Yes.

Mr. Brick: All right, sir.

Mr. Withrow: I offer to prove through oral testimony and also through four photographs which would have been

Respondents' exhibits, for identification, had they been marked, photographs taken by the Manning Brothers, Inc., in Detroit, Mich., their numbers 136277, 136278, 136279, and 136280; that the Peerless Cement Corporation has installed at its mill in Detroit a special pack house
34293 with special loading facilities in order to adequately service trucks, and that this separate pack house is so arranged that both rail and trucks may be loaded at the plant at the same time.

I offer to show further that as a result of such facilities and the result of having contracts with contract carriers, the Peerless Cement Corporation is enabled and does maintain its shipping schedule for the truckload lots which they ship from their plant.

Trial Examiner Norwood: Proceed.

Mr. Withrow: I also make an offer of proof on the line which Your Honor excluded a little while ago, and I offer to show through this witness that the trucking companies—one of the trucking companies in Michigan has gone before the Michigan Public Service Commission for the purpose of securing increases in trucking rates, and that this company has opposed such increases in trucking rates.

Trial Examiner Norwood: Counsel has his exception.

34295 By Mr. Withrow:

Q. Mr. Russell, is the Peerless Company a member of The Cement Institute?

A. Yes.

Q. Do you know how long the company has been a member of the Institute?

A. Not exactly, but prior to the time I came with the company it was a member, and I believe 1930 or '31 it became a member.

Q. Has the Peerless Company retained its membership ever since you have been with the company?

A. Yes.

Q. Have you inquired into or considered the reasons why you maintain a membership in the Institute?

A. Yes.

Q. Could you tell us briefly what your reasons are for continuing your membership in the Institute?

A. At the present time our only reasons that I know of are to provide convenient machinery to pay our assessments in connection with the defense of this case.

Q. Prior to the advent of this case, did you have any special reason for maintaining a membership in the Institute?

34296 A. Well, yes; in that the collection of the data furnished by the United States Bureau of Mines was put in usable form by The Cement Institute, and it was a convenience to me to study the information as put out in that form, and, furthermore, the assessments and costs belonging to the Institute were so small under those conditions that it was not an important matter.

Q. Have you ever been an officer of The Cement Institute?

A. Yes—I beg your pardon. Not an officer.

Q. Have you been a trustee of the Institute?

A. As a trustee, if you mean by that an officer; yes.

Q. Was that before or after the complaint was issued in this case?

A. After.

Q. Have you attended any Institute meetings?

A. Yes.

Q. Will you tell us how many prior to July, 1937?

A. I don't know of any particular Institute meetings prior to July, 1937, although I may have been at a meeting that was an Institute meeting. The reason I say that is because if I was—it was at the time there was a Portland Cement Association meeting, and I know that an Institute matter was discussed at one of those meetings that I was present at.

34297 Q. As trustee, have you had any occasion to call any meetings of the district where you were district trustee?

A. No.

Q. You told us about receiving statistics from The Cement Institute. Will you tell us briefly what use you make of this statistical information?

A. The only use that I make of it is to read it when it comes in and form an opinion from that information as to the volume of cement consumption in the United States and thereby have some knowledge of the extent of the industry, particularly in the territory in which we are operating.

34298 The witness identified Resp. Ex. 2416 as being prepared in the regular course of business in the office of the Peerless Company. This is one of the

ways that statistical information furnished by the Institute is passed on to the salesmen for their information and study.

(RESP. EX. 2416 was offered and received in evi-
34299 dence.)

By Mr. Withrow:

Q. Mr. Russell, do you set a quota each year for the amount of cement that you want to ship? Do you set a quota in advance of the shipping season?

A. I would say that we do not set a quota. We make an estimate for budget purposes which might be called by some people a set quota. That estimate of possible or probable shipments is made during the first two months of any given year, and is then set up and is called a quota by salesmen and others.

Q. Would you ever discuss this estimate with any of your competitors?

A. Never have.

Q. Would you tell us whether this estimate has anything to do with any plan or agreement for restricting production of cement?

A. None whatsoever.

Q. Of a plan, or with reference to a plan of allocation of business among the companies?

A. None whatsoever.

Q. Are the statistics which you receive from the Institute—are they available from other sources?

A. I believe that those statistics would be avail-
34300 able from the Bureau of Mines. It would be somewhat more difficult to assemble those statistics in a form that we would like to have them, but they are available.

Q. Mr. Russell, could you tell us roughly what percentage of the consumption in your sales area has been shipped by the Peerless Company, say, in the year 1937?

A. I can tell you within two or three percent of what we shipped of the total consumption as reported by the Bureau of Mines in 1937. I believe that we shipped approximately 17 or 18 percent of the available tonnage of Portland and high early strength cement that was reported by the Bureau of Mines.

Q. Has this percentage remained constant during the years?

A. No, neither by years or months.

Q. Has the Institute ever attempted to dictate the policies of the Peerless Company?

A. No.

Q. Have you before announcing any policy or making any announcement to the trade ever submitted it to the Institute for its opinion or approval?

A. No.

Q. Have any of the policies of the Peerless Company been adopted upon the suggestion of The Cement Institute?

A. Not since I have been with the Peerless Company.

Q. Do you know of any before that time?

A. And I did not know of any before that, but I
34301 can't answer for that.

Q. Has the Peerless Company ever received letters or memoranda from the Institute concerning the establishment of industry policies or concerning prices, specific prices?

A. Well, I believe that during the N. R. A. days, as I recall it, there was a Code of Fair Trade Practice under discussion by committees of the Institute and of the industry, and I believe, although I do not remember the specific instances—I believe that we did receive correspondence pertaining to a fair trade practice code under the code laws, but other than that I don't know of any instances.

Q. And those letters, were they in connection with the drafting of the N. R. A. Code for the Cement Industry and the revisions of the Code?

A. Yes.

Q. Did you ever receive any anonymous communications from trustees of The Cement Institute?

A. No.

Q. As trustee of the Institute, have you ever sent any anonymous communications?

A. I never have.

Q. Do you recall the Compendium which was published by The Cement Institute in December, 1935?

A. No, I don't recall it, by that name, at least.

Q. It was also called the Compendium of Estab-
34302 lished Terms and Marketing Practices. Does that refresh your recollection?

A. No.

Q. Could you tell us whether or not the Peerless Company, to your knowledge, ever adopted the Compendium and used it as its sales policy in 1935?

A. Ever adopted a Compendium prepared by The Cement Institute and adopted it as our policy?

Q. Yes.

A. We did not, I am sure.

Trial Examiner Norwood: It was prepared by members of The Cement Institute, wasn't it?

Mr. Withrow: Trade Practice Committee.

The Witness: We have never adopted any trade practice or policy or compendium prepared by anybody outside of the Peerless Cement Corporation since I have been connected with the corporation.

34307 Q. Mr. Russell, would you tell us what stand the Peerless Company took on the proposed plan for sharing available business under the N. R. A. Code?

34308 A. I never knew of any plan to share available business proposed by either the industry, or the Cement Institute, or any other group plan, so I cannot state—make any other statement about any stand taken on something that I have no knowledge of, of that kind.

By Mr. Withrow:

Q. Well, did you attend the meeting, the meeting in Chicago, at which such a plan was voted on?

A. A plan voted on at The Cement Institute?

Q. A meeting of the Code Authority.

A. At a meeting of the Code Authority?

Q. Yes.

A. I am quite sure I didn't attend any such meeting.

34310 Q. Did you have any discussions with anybody in your company at that time about any such plan that you now recall?

A. I don't remember of ever discussing with anybody in the company this particular plan. We have discussed in our company the fact that various men have talked about the subject of sharing available business, but it is a thing I have never subscribed to under any circumstances.

While we discussed it, it does not mean that I have ever subscribed to any plan.

Q. Well, have you entered into any agreement with any of your competitors to share available business?

A. No, sir.

Q. In any way?

A. No, sir.

34314 New York, New York.
Tuesday, March 12, 1940.

34317 WALTER C. RUSSELL thereupon resumed the stand and testified further as follows:

34325 By Mr. Withrow:

Q. Mr. Russell, do you recall any instances in connection with your company where land grant rates were involved?

A. I do not recall any instances where our company bid on any work that involved land grant rates.

Q. Mr. Russell, does the Peerless Company compete with imported cement?

A. We do not compete directly with imported cement dumped into the area in which we ordinarily deliver cement, so far as I know.

34326 Q. Well, have you ever entered into any agreement for the purpose of restricting or cutting down importations of foreign cement?

A. No, sir.

Q. Now, are there any instances other than that bridge at Sarnia, which you testified about on Friday, where you have come in competition with foreign cement, that you can recall?

A. That is the only instance since I have been with the company that I have knowledge of.

Q. Has the Peerless Company ever exchanged orders with other cement companies for the purpose of saving the freight?

A. No, sir.

Q. Is there a seasonal variation of demand in Michigan?

A. Yes, if you—my understanding of that question is there is a variation in the demand of consumption for cement, and there is a seasonal variation in that demand.

Q. Does this variation have any effect on the size, the volume, or the capacity of your mill and cost of production?

A. It has a very considerable effect on the equipment and storage facilities that are required in order to provide cement in the peak periods of consumption.

Q. What effect does it have on cost, if any?

A. It has a substantial effect on the cost of manufacturing and selling.

Q. By that you mean it raises or lowers cost?

34327 A. It raises the costs compared to what they would be if it were possible to manufacture and deliver for a uniform consumption or demand.

Q. Do you try to operate your mill on a twelve-months' basis?

A. We try to operate on a twelve-months basis our Detroit mill under the present existing circumstances.

Q. Have you been successful in this attempt?

A. We have been substantially successful during the past four years in operating the Detroit mill at approximately uniform production rates, and for practically the whole twelve months period in each year.

I make that statement with the exception of a week to ten days shut-down that is always necessary in any year to make certain necessary repairs in the equipment that has to be stopped in order to make the repairs.

Q. When you say you operate throughout the year, do you operate all the kilns throughout that time?

A. Not necessarily and we have not been successful in operating all of the kilns all the time the mill is operating. I did not mean to imply that by my first answer.

34329 Q. Mr. Russell, since you have been connected with Peerless Cement Corporation, have you ever considered selling on a uniform f. o. b. mill basis?

A. I have tried to understand what could happen under that so-called f. o. b. mill basis, because it has been discussed so much, but I have never been able to give consideration to a thing which—a thing or a pricing method which has seemed to me to be completely impractical or impossible to put into practice.

Q. Mr. Russell, there is some evidence in the case that the price in Detroit, starting around—beginning in the first of 1937 and continuing for a while, was reduced on a number of occasions.

From your experience, did this have the effect of driving any substantial number of competitors out of the

34330 Detroit metropolitan market?

A. The several price changes during that period of 1937 and 1938, did not, in so far as I was able to determine, have any effect or whether different manufacturers changed the amount of cement or were able to change the

amount of cement delivered into the area in which we shipped.

Q. Did any company, to your knowledge, cease trying to sell cement in Detroit, during that time when the price was being progressively reduced?

A. Not as far as I know. There may have been companies that either increased or decreased their activity, but I have no knowledge of that.

Q. Mr. Russell, do you attempt to concentrate your sales effort in the Detroit metropolitan area?

A. We do not.

Q. Will you explain to us, briefly, why you do not attempt to so concentrate it?

A. It would be rather difficult to make a brief statement of the many—

Q. Would you give us your reasons?

A. —Business reasons. But one of the principal reasons I can think of is that if we were to concentrate our efforts within a restricted area, we will say within a fifty mile area, of Detroit, and not attempt to sell outside of that area, as soon as we were to do that, we would 34331 not be exerting any competitive pressure on customers outside of Detroit, and would immediately be very vulnerable to intense competition in that particular area; and I know of instances where, to a degree, that has been done by companies with the result that competition moves in and affects both price and volume, and still further restricts the amount of cement or commodity that can be delivered in that restricted area.

Now, to my mind, that is, I think, one of the principal things, but there are many factors that are enter into that.

Q. Well, could you secure all of the cement that you wanted to ship within that Detroit metropolitan area under the conditions as you see them?

A. Only if I were a magician, and I see no way that could be done.

Q. Well, would you also tell us whether it has been your experience that there is a variation in demand in that Detroit metropolitan area, or has it been relatively constant?

A. There has been a very considerable variation from year to year in the amount of cement consumed in that area.

34335 Q. Mr. Russell, would you describe to us briefly what your office does when it receives information from the trade that competitors have increased or reduced prices at points where you sell cement?

A. We do not receive information from the trade if, by the trade, you mean sources outside of our own organization, except as we may get information through dealers who are customers of ours, our contractors to whom we are attempting to sell cement. And our first knowledge of price changes, within my experience, has been when our own sales organization has called our office and told us that in contacting a customer, that customer has been quoted different prices than our salesmen would, at the time, be quoting.

Q. After you have that information through your sales force, that the price quoted to one of your dealers is different from yours then what does your company do?

A. With one or two exceptions, it has been our practice to verify that at the earliest possible time. Usually, it takes from one to three hours to get enough sub-
34336 stantiating data to verify the information that is called in by the first man, and immediately we have sent out quotations to the trade to make our prices conform with that information that we had gotten.

It takes from—I would say, from five to six hours to get those quotations in the mail if we determine to do it immediately.

Q. Now, when you said "to verify" how do you verify?

A. Well, information of that nature comes to the office, it nearly always is reported first to the traffic manager and shipping manager, and he reports to the sales manager, who immediately starts contacting our other salesmen in the field, giving them instructions to pick up information at the earliest possible time, and it doesn't take very long for the salesman to immediately contact his dealer-customers and contractors, and they call back to the office and report on the conditions or prices as found.

Q. Do you always decide on the same day as you get the price information to follow along on the price change?

A. Nearly always, but not always. I have—I can remember one or two instances where we delayed one or two days, thinking that it didn't make any difference if we delayed slightly.

Q. And, in the case of these delays, were they price advances or price declines; do you recall?

34337 A. I can't recall the particular instance that we may have delayed on them.

Q. There is some testimony in this case about the existence of a zone price in the lower peninsula of Michigan established by the Huron Company.

Do you recall when this change came about? I mean when it did come about, not the exact day.

A. I remember the instance very well, but I do not remember the time, particularly. I believe it was in 1937 that that condition existed.

Q. Well, did you follow any different routine in your office in getting information from your customers in that instance, than in other instances?

A. We followed no different routine.

Q. You were still checking prices at destination?

A. We were still checking price at destination, but it caused considerable confusion, inasmuch as it took a longer time to find what the price pattern was over the area. We very soon satisfied ourselves, however, that the pattern was all at one level all over the lower peninsula of the state.

Q. And, did you follow along with that change?

A. Of necessity, we had to follow if we continued to ship cement to customers.

Q. Why do you say "of necessity"?

A. We certainly would not have been able to sell cement at a higher price. We would have sold at a

34338 lower price, probably no different volume, but the price was already too low for us to operate and make money.

The witness identified Resp. Ex. 2438-A and B as one of the printed forms from Peerless which it uses in publishing prices to the trade or for customers. This form or a similar form was in use prior to July 1, 1937. He is not positive whether or not slight changes may have been made in the forms as Peerless had them printed from time to time. Apparently the last numbers on Resp. Ex. 2438-A on the back in the lower left hand corner refer to a date in 1937 so this form was apparently used in 1937.

34339 (RESP. EX. 2438-A and 2438-B was offered and received in evidence.)

By Mr. Withrow:

Q. How often, Mr. Russell, did you send such quotations to the trade?

A. I believe that we have, in the past several years, only sent out quotations to the trade at such times as there would be a change in the price or conditions of selling.

Q. Now, would you tell us whether your company keeps on file in the office, a list of destination prices at those points where you have dealers or where you solicit business?

A. We have in our office such lists of destination prices which, of necessity, are continually changing all the time.

Q. Now, do you inform anyone of any price changes which the Peerless is going to make before you actually send the quotations—mail the quotations?

34340 A. We never have in the time I have been connected with the company.

34342 Mr. Withrow: Your Honor, if Mr. Wooden is willing to concede this at this time, why there, of course, is no necessity for proof.

We offered to stipulate this factor and, therefore, we have met him both ways. But if he is going to concede them, we have no purpose in going further with this proof.

Mr. Wooden: We proved it on our own case.

Trial Examiner Norwood: The fact is you picked up competitive prices and you are alleged to have picked up competitive prices. There has been so much proof to that extent, we will receive no more.

Mr. Withrow: All we want is to have the fact shown.

Trial Examiner Norwood: There has been so much of that already shown that I think there is no real purpose to be served in taking a great deal of time and increasing the number of documents in the record that might have to be printed later.

The objection is sustained.

Mr. Withrow: Will you mark that, please.

Trial Examiner Norwood: That may be marked.

34344 Q. Mr. Russell, do you consider either of your mills to be so-called basing points?

A. We consider that our Detroit mill is so close to a

basing point, that there would be no object in our naming it as a basing point. It is not identified by name as a basing point mill, however.

Q. When you say, "so close to a mill" you consider a basing point, what mill are you referring to?

A. There is the Wyandotte plant of the Huron Cement Company within four miles of our Detroit plant.

Q. Do you know whether you are in the switching district of metropolitan Detroit or not?

A. I do not think the Wyandotte mill is in the switching area. I'm not sure of that.

Q. Well, have either of your mills; that is, the mill at Detroit or Port Huron ever been basing mills since you have been with the company?

A. No.

Q. Is there any obstacle in the way of your converting the Detroit mill into a basing mill if you so desire?

A. There is no obstacle against our doing it if we wanted to. There is, to my mind, a sound business reason if it could be called an obstacle in that were we to make that a basing point, it would add considerable to clerical work, add confusion to our billing and pricing; without affecting in any way the general level of prices in
34345 the territory that we serve. I would define that as a reason for not doing it, rather than an obstacle in the way of doing it.

Q. We have been using this term, basing point. Will you tell us what that term means to you, Mr. Russell?

A. That term means to me, that one must, as a practical means of putting a price on a commodity, place a price on that commodity at a particular time and at a particular location in order to have a place to start from in pricing. The commodity at that place, and at the time the price is placed on it, at that place, then has to move to points of use, and by placing a price at the time and at the place, you enable yourself to determine a price at the point of use, wherever that may be, after adding certain transportation costs.

The use of the words "basing point" is just a convenient term to apply to that method of determining price.

It is not necessarily the method that we have used throughout the time that I have been with the company; although it has always been used in some of the territory into which we ship cement.

Q. Will you tell us whether or not, Mr. Russell, there have been times when most of your cement was sold at a price that could not be calculated back to any base plus freight?

A. All during the time that the so-called zone
34346 price basis was used in the lower peninsula, our principal volume of shipments could not be deemed as having been sold to the customer on any so-called basing point method.

Trial Examiner Norwood: That is, within that zone area?

The Witness: Correct.

Trial Examiner Norwood: At the same time, you sold outside of that area?

The Witness: We sold a small proportion of our cement outside of the so-called zone area. I might state that that lower peninsula of Michigan accounted for something more than eighty-five per cent. of our shipments.

Trial Examiner Norwood: What was sold outside was sold at prices which related into your base or somebody else's base; is that right?

The Witness: They related to some other bases.

By Mr. Withrow:

Q. Mr. Russell, when you meet the delivered prices, you find in the field, is the Peerless Company de-
34347 prived of any special benefit by the location of its plant at Detroit by doing that?

A. When we meet a particular price that we find in the field, I cannot see where that has anything to do with the location of our plant.

The location of our plant has to do with the problem of whether or not we can manufacture a cement or the commodities that we sell at a cost less than the prices we find in the field or at competitive places.

Q. Would you tell us, if you know, whether or not you have lower trucking rates or lower freight rates to any large number of points, as compared to the mill at Wyandotte?

The Witness: I believe that the freight rates that we pay for trucking are substantially the same as the
34348 freight rates paid for trucking by competing mills. However, I do not have definite knowledge of the exact truck freight rates paid by various competitors. I only have such trade information as comes through

our salesmen, dealers, and others, but no positive records of payments on rates.

34349 By Mr. Withrow:

Q. Mr. Russell, I will ask you to glance through Respondents' Exhibits 2442 through 2448, and ask you to tell us what they are, if they are all the same?

A. These papers are instructions from the assistant to the sales manager to salesmen, routine instructions, investigation reports of the salesmen on certain dealers or people who would be dealers, or have requested to become dealers, together with some reports from the salesmen back to the office.

They are regular forms and memoranda used in our office.

Q. Were those reports and memoranda made in the regular course of business?

A. They were.

Q. And do they represent the procedure followed by the Peerless Company in determing whether or not they will sell a person as a dealer?

A. They represent a part of the procedure that we use in trying to determine who may be satisfactory dealer-customers of ours.

Q. Will you tell us, briefly, what the rest of that procedure is?

A. In addition to such formal reports and memoranda, as go through the office, we rely on the personal

34350 opinion of salesman, contractors, and others doing business with such men as might want to become dealers, and, in many cases, on the personal knowledge of the sales manager, or of myself, as to the conditions in the particular area that dealer operates in, and that is what I meant by saying this was a part of the procedure in determining whether or not a man could become a dealer.

Mr. Withrow: Your Honor, I offer in evidence Respondents' Exhibits 2442 through 2448, with the appropriate lettering to each number.

34352 Trial Examiner Norwood: Is it your testimony this is identical with the procedure that you followed prior to the issuance of the complaint?

The Witness: Yes.

Trial Examiner Norwood: And this is merely illustrative of that?

The Witness: That is correct.

(RESP. EXS. 2442-A, 2442-B, 2442-C, 2442-D, 2442-E; 2443-A, 2443-B, 2443-C, 2444-A, 2444-B, 2445-A,
34353 2445-B, 2446-A, 2446-B, 2447-A, 2447-B, 2447-C; 2447-D, 2448-A, 2448-B, and 2448-C, were offered and received in evidence.)

By Mr. Withrow:

Q. Do you require that a dealer be sold by some other cement manufacturer before you will sell to him?

A. No.

Q. Would you tell us whether or not you have a strict definition of a dealer which you apply in all instances?

A. We don't have a strict definition of a dealer.

Q. Would you tell us what you do in selection of a dealer? I mean, the application of your concept of a dealer.

34354 A. The application would be made, I believe, in this way, starting with a general definition of a dealer as one who is regularly engaged in the handling of building supply materials, such as bricks, lumber, shingles, plaster, and all materials that go into a building, we would sell to that man if his credit standing was good, if he was the type of man that we figured we could do business with.

He might be one type of a dealer in one location, however. That is, he might conduct an elevator business in a rural community, whereas, in a metropolitan community, he would not conduct the same type of business, so our definition, of necessity, would be modified, depending on the locality and general type of business in the particular vicinity in which the so-called dealer is located, so that no particular iron-clad rule could be laid down as to who one will accept as a dealer or customer or who one may try to sell.

Q. To summarize your qualifications, you say a rural community would be different from metropolitan Detroit?

A. That would be a general statement, correct.

Q. Do you have any exclusive dealers?

A. We do not define any of our dealers as exclusive dealers. There may be dealers who handle our cement and no other brands, but I do not know of any such.

Q. Do you find, or have you found there are
34355 building supply dealers to whom you won't sell that are being sold by some of your competitors?

A. There have been a few instances in the—in my experience with the company when we have ceased to solicit business from so-called dealers, and one or two instances where we have refused to ship to people who wanted to place orders with us.

It is not within my knowledge as to whether or not our competitors have done business with those people, those particular ones I had reference to.

Q. Do you have any agreement with your competitors as to what individuals shall constitute dealers and which ones shall not?

A. We have none whatsoever.

Q. Do you have any agreement with dealers associations as to who shall constitute dealers?

A. We have none whatsoever.

Q. Do you make it a requirement to become a dealer that they belong to a dealer association?

A. No, sir.

Q. Has the Peerless Company ever established a basing point at a non-base mill of a competitor?

A. I do not believe so, and I know they have not within my—within the time I have been connected with the company.

Q. Has any competitor ever imposed a base at
34356 your mill since you have been connected with it?

A. No.

Q. Mr. Russell, in your experience with the Peerless Company, have you ever found any facts indicating the existence of special prices and terms being granted by your competitors?

A. Yes.

Q. Will you tell us what those facts were?

34357 Mr. Wooden: We yet have not found out how he found out. My objection went to the sources as being hearsay.

Mr. Withrow: That is not hearsay.

Trial Examiner Norwood: I think that point is very well taken. You might tell us if you investigated how those facts came to your knowledge.

I will ask you that question now.

The Witness: I stated that I would have—that I did have definite knowledge that competitors had favored certain dealers with special consideration. I had reference to some of the bids that dealer-customers of competitors

of ours had made to municipalities, counties, and to the Federal Government, which bids were below the then existing published prices to those dealers.

My own definition of using that as definite information was to the effect, or is to the effect, that it is definite when my own opinion is that those dealers in making such low prices to municipalities, counties, and the Federal Government, would not do so if it entailed losses of ten, fifteen, twenty thousand dollars per order.

34364 By Mr. Withrow:

Q. If the record shows that the flat zone price—special flat zone price for Wayne, Oakland, and Macomb counties was June 1937, would you not say that was approximately the date of the Koenig job?

A. I believe that was about the time that cement was bid on.

Q. Will you complete your story of the circumstances?

A. This particular time. I remember that the Koenig Coal Company bid a price that was then less than the published prices to dealers by ourselves and, I believe, other manufacturers.

Trial Examiner Norwood: At that particular time?

The Witness: At that particular time.

By Mr. Withrow:

Q. Do you remember approximately how much 34365 difference that amounted to, Mr. Russell?

A. It was something more than six cents. I do not remember the exact amount. I merely know it was considerably less.

Q. And on how many thousand barrels, about, do you recall?

A. It was about three hundred thousand barrels, as I remember, in Detroit, and two hundred thousand in Flint.

Q. Have other instances such as that come to your attention over the years?

A. There had been other instances that were not quite as definite as to the then exact loss that the dealer would take if he had bid the published price, but many other parallel instances.

Trial Examiner Norwood: Do you know who Koenig was buying this cement from? For that deal?

The Witness: I believe that Koenig furnished Huron Cement on that particular order which was, I believe, subsequently given to him.

By Mr. Withrow:

Q. Now, could you tell us whether that bidding by the Koenig Company at a price lower than the lowest quoted market price by any cement company, had any effect on the market price, if you recall?

A. I believe that that was immediately followed by new published prices. It was either that particular instance or a similar one at that time, that on the same day that bids were received by the Government quotations were picked up by our salesman bearing the post-mark as of the same time that the bids were opened by the Government.

Q. Reducing the price or increasing the price?

A. Pardon?

Q. Reducing the price or increasing the price?

A. The price was reduced from what it had been as a published price at the time the Government received the bid.

34376 Q. Mr. Russell, do you sell all of your cement through dealers?

A. No.

Q. Well, what cement do you sell through dealers and what do you sell direct to the customers?

A. I do not know the percentage of distribution we sell to the various classes of customers. I do know, however, that more than half of our cement is sold through the customers whom we classify as dealers.

A substantial portion of our cement is sold direct to customers who have bid on certain state, county, and municipality work, although, in general, the municipal work is sold to dealers who resell to contractors.

We also sell to people who are, what we call "concrete products manufacturers" make direct sales to them.

Those three classifications would cover the classes of customers whom we have.

Q. How do you determine, when you will sell
34377 through a dealer and when you will sell through a contractor?

A. That determination is quite often difficult, but, in general, we determine that by determining whether or not, in making a sale to a customer of a given classification, we are doing so in such a way that there is no conflict of interest between the classes of customers.

Q. And how long has your policy of selling part through

dealers and part through contractors, and also part through concrete product manufacturers been in existence?

A. The policy we now have in making our sales has been substantially the same ever since I have been with the company.

The witness identified Resp. Ex. 2449-A to N as papers from Peerless' files pertaining to instructions by Executives to salesmen concerning sales matters.

34380 (RESP. EX. 2449-A, 2449-B, 2449-C, 2449-D, 2449-E, 2449-F, 2449-G, and 2449-H, was offered and received in evidence.)

By Mr. Withrow:

34381 Q. Mr. Russell, will you tell us, if you know, whether the practice of the Peerless Company in its sales to different classifications of customers is the same as you find competing companies selling?

A. I do not know what the practices of competing companies are in detail. I know substantially what trade practices are, and I would say that they are similar but not the same.

Q. Have you found, for instance, down around Toledo, any of your competitors selling the W. P. A. direct?

A. I know that various companies in Ohio are bidding W P A projects direct. That is, the manufacturers are selling direct to the Government.

Q. Do you know, Mr. Russell, of any other differences, prior to—I mean, can you recall any prior to July, 1937?

34382 A. I know that all the time there are deviations from published prices and practices,—

Trial Examiner Norwood: I will overrule the objection and deny the motion.

34383 Finish the answer.

The Witness: (Continuing.) And have been prior to 1937.

34390 Q. Mr. Russell, would you tell us whether or not it is the policy of the Peerless Company for your salesmen to check up announcements of trade policies of its competitors?

A. Yes, sir.

34391 Q. Mr. Russell, do you recall any announcements of policy by the Peerless Company around February, 1935?

A. I do not remember any particular announcement of policy.

Q. I show you these papers, Mr. Russell, and I will state they have not been marked but I would be glad to have them marked if counsel wants, and ask you if these refresh your recollection about receiving policies of competitors from your dealer-customers about that time?

A. I remember these announcements having been received and reading them at the time. Yes, I remember.

Q. After receiving those announcements, do you recall whether you issued any announcement of your own?

A. I don't remember whether we issued a statement of our own, or not.

34392 Q. I show you Respondents' Exhibit 2451 and ask you if that refreshes your recollection about the announcement of policy?

A. This is a form on our stationery which was issued February 25, 1935, to the trade, giving a statement of who would be sold cement through dealers and direct.

Q. Does that refresh your recollection?

A. I remember having seen this.

Q. Who made the decision to send out this marketing announcement; do you recall?

A. The sales manager made the decision, and I remember that there were discussions about the idea at that time.

Q. Did the sales manager consult with you about issuing that announcement?

A. Yes.

Q. And did you enter into any agreement with any of your competitors to issue such an announcement policy?

A. I did not.

Q. Did you enter into an agreement with dealers or dealers association to issue such an announcement?

A. I did not.

34398 Q. Mr. Russell, have you ever attempted to fix or control the resale mark-up quoted by your dealers on cement?

Mr. Wooden: That is objected to as irrelevant and immaterial. We have not made an issue of that in this case.

Mr. Withrow: Your Honor, if Mr. Wooden is willing to concede that issue is not in this case, I shall be very glad to refrain pursuing the matter further.

34399 Mr. Wooden: I have reference to dictating and controlling the resale price, that is what I am talking about.

We haven't any issue of resale price.

Mr. Withrow: If you concede the matter of resale price is not in this case, in any shape or form, I will not go into this matter at all.

I made that offer now.

Mr. Wooden: There are questions of dealer margins.

Mr. Withrow: I think dealer margins and resale mark-ups are the same.

Trial Examiner Norwood: I shall overrule the objection. Answer the question.

Mr. Wooden: A dealer can cut his margin, that is a different thing.

The Witness: We have never attempted to dictate or control the amount of resale or mark-up or margin the dealer gets for his cement.

I must state we have always been interested in this matter, but it is taken care of automatically by the competition as between dealers, and ourselves, as manufacturers cannot influence that particular phase.

By Mr. Withrow:

Q. What do you mean when you say it is taken care of by competition, Mr. Russell?

34400 A. I think of one particular instance where we sold cement to a dealer in Grand Rapids. The quantity was so large that that dealer was not able, in the face of his competition, to get the same margin of profit he had been getting on smaller orders, and there was a lot of competition as between dealers as to how much he could get.

Q. Has the Peerless Company ever allowed cement to be shipped by water from its plant?

A. Yes.

Q. Have you sold the United States Government 34401 for barge transportation and boat transportation?

A. We furnished such cement that was used on Government improvements on the Great Lakes and the northern part of Michigan. Whether or not that cement went through a dealer, or was a direct sale to the Government, I am not sure.

Q. Mr. Russell, I call your attention to Commission's Exhibit 45-A to D, and ask you if you recall the meeting referred to in that?

A. I remember meeting with a group of men in Chicago, and Mr. Johnson was with this group. My recollection was it was some time after 1935, but I have no recollection; that is, I have no reason to believe that I was not in this particular group if it was set forth in the letter of Mr. Johnson.

Q. Would you tell us what you recall taking place at that meeting?

A. I looked through the letter and I did not see—it may state there where that meeting took place. I did not read it carefully.

Trial Examiner Norwood: Did you have anything to do with that letter?

The Witness: I did not. My name, however, appears in it.

Trial Examiner Norwood: Yes, but do not look at it. Just tell us as a matter of fact.

34402 By Mr. Withrow:

Q. Would you tell us what your recollection was as to where that took place?

A. I believe that must have been in Detroit, but I have no definite recollection of that particular meeting if that was in Detroit.

Trial Examiner Norwood: Do you remember whether it was a Detroit meeting or not?

The Witness: I do not. I remember of attending some meeting of the Institute two or three times in Detroit, and if that meeting was—so-called meeting was on the same day, I may have—it may have been at that time, the reason I haven't a definite recollection of that particular one.

By Mr. Withrow:

Q. Do you recollect attending such a meeting in connection with any meeting of the Portland Cement Association?

A. No. If I understand your question correctly, I can correct myself this way: at a time when I was at a Portland Cement Association meeting in Chicago, Mr. Johnson invited myself to come into a room one afternoon, in the Blackstone Hotel, and in that room there were several men including Mr. Johnson, Mr. Cree, and Mr. Lingeman.

And, at that time, Mr. Johnson read a letter that he had prepared, setting forth certain instructions to
34403 Mr. Cree and Mr. Lingeman, and I never was clear in my own mind why he should invite myself and other members of cement groups in, except that he was giving instructions to his own men, apparently, for the purpose of impressing on those employees the necessity of following instructions.

Q. Did you discuss with Mr. Johnson, this letter which he read?

A. I did not.

Q. Was there any agreement entered into at that meeting?

A. No. There was not, to my knowledge. Certainly not on my part.

Q. I would like you to look at Commission's Exhibit 45-A to D again, and tell me whether that meeting you have talked about was the one referred to in that document?

A. May I read this letter?

Q. Yes, that is the last question.

34404 The Witness: The letter Mr. Johnson read in Chicago at that time, was very similar to this letter, and I believe this may have been the one.

By Mr. Withrow:

Q. That wasn't quite my question. Is the meeting referred to in that letter the meeting which you were just talking about, if that letter refreshes your recollection; if it does not, just say so, and we will go on.

A. That is the only meeting I know of at which a letter like this was read, or at which matters of this kind would have come up through Mr. Johnson.

Q. Did you know in advance of Mr. Cree's discharge that Mr. Calvin was going to be put in charge?

A. I did not.

Q. Did you know in advance of Mr. Cree's discharge that Mr. Cree was to be discharged?

A. I did not.

Q. Did you do anything to keep Mr. Cree from obtaining a job?

A. I did not.

34405 Q. Mr. Russell, did Mr. Cree ever take up with you the question of the warehouse at Port Huron after this meeting in December, 1935?

A. He did not.

34418 Trial Examiner Norwood: I shall give the counsel an exception on that. I cannot see any necessity for going into those side issues.

They are irrelevant. There as been a good deal of time spent in this case. We should be very selective.

By Mr. Withrow:

Q. Mr. Russell, can you tell us, if you know,
34419 from the books and records of the company when the Peerless Cement Company was originally organized?

A. From my examination of the books and records of the company, the original business venture was started about 1896.

Q. And is that the same company as exists at the present time?

A. It is not the same corporate form as exists at the present time.

Q. When did the corporation—the corporate form which now exists, come into being?

A. The corporate form as it now exists came into being in 1928. It was slightly modified as to name after that time and also slightly modified as to its corporate setup in the reorganization.

Q. Since you have been connected with the Peerless Company, Mr. Russell, have you made any efforts to reduce the cost of manufacture?

A. Yes.

34423 Q. Mr. Russell, to your knowledge, does any cement manufacturing company hold stock in the Peerless Cement Corporation?

A. So far as I know, no other company owns any Peerless Cement Corporation stock.

Q. Do any of the officers of the Peerless Company—are they officers of any other cement producing companies?

A. So far as I know, no. You asked "officers"?

34424 Q. Officers.

A. No officers of our company are officers of any other cement company. I am sure of that.

Q. Would you tell us briefly about the connection between the Peerless Cement Corporation and the Bessemer Securities Company?

The Witness: The Bessemer Securities Company owns

approximately sixty thousand shares of Peerless Cement Corporation stock which they purchased in 1928.

By Mr. Withrow:

Q. Are any of the directors on the Board of Directors of Peerless Company also directors of the Bessemer Securities?

A. One of our directors, Mr. Bliss, I understand,
34425 was a director of the Bessemer Securities Corporation.

Q. Has he—Mr. Bliss—by virtue of his directorship taken any part in the management of the sales and marketing policies of the Peerless Company?

A. He has taken no part.

34426 Q. Mr. Russell, would you tell us what is the average haul per barrel on the cement shipped by the Peerless Company?

Mr. Wooden: Objected to as irrelevant and immaterial.

Trial Examiner Norwood: The average mileage?

Mr. Withrow: Yes.

Trial Examiner Norwood: Objection overruled.

The Witness: I would have to take a particular year
34427 on which we have records, in order to answer that question, and the year 1938, our examination of the total average distance that all of our cement moved showed approximately thirty-two miles from our Detroit plant.

Trial Examiner Norwood: That is what sort of average, weighted average?

The Witness: That is a weighted average, yes, sir.

Trial Examiner Norwood: What was the farthest distance?

The Witness: The farthest distance was approximately two hundred and fifty miles of a very small portion of the cement.

Trial Examiner Norwood: Go ahead.

By Mr. Withrow:

Q. And would you tell us, if you know, whether in 1938 the survey would represent a typical year—is there anything which would make that seem—shorter average shipments in other years?

A. It would take a very considerable shifting of population to move that distance more than two miles.

Q. Either way?

A. Either way.

Q. How many salesmen does the Peerless Company have?

A. At the present time, we have fifteen men, including sales manager.

34428 Q. Have any of these been added since you have been connected with the Peerless Company?

A. I believe that we have added three men on special cements since I came with the company.

Q. Have you added any salesmen for the purpose of extending your market territory or improving your position in any market territory?

A. We have put one man in the State of Ohio, working territory that I am sure was not worked prior to the time that I came with the company.

Q. Mr. Russell, in connection with the sale of cement to building material dealers and contractors, what have you found as to whether or not these customers were well informed as to the delivered prices quoted on cement?

A. My personal knowledge of that convinces me that dealers, contractors, concrete products people are well informed about the market of cement, and the practices involving services and delivery and terms.

Q. Have you found that contractors shop around and approach different manufacturers in order to purchase their cement?

A. Yes, sir.

Q. Now, in the event of a price decline, Mr. Russell, do your dealers, regular dealers and contractor customers give you an opportunity to meet the lower prices quoted by competitors?

A. Not only do they often give us an opportunity,
34429 they often create situations that would lead us to believe there is an opportunity.

Trial Examiner Norwood: You mean they misrepresent the price—that is, in order to get a lower price?

The Witness: There are certain people who have done so.

By Mr. Withrow:

Q. Mr. Russell, the other day you testified about one or two occasions where the Federal Government asked for bids f.o.b. mill.

Will you tell us the usual form of request for bids on

cement by Government and State Departments? Is it f.o.b. mill or f.o.b. destination?

Mr. Wooden: Your Honor, if there is anything that I think has been shown in this case over and over again, and shown by us, it was the usual method of requesting business on a destination basis.

Mr. Withrow: If the Commission concedes the point, why, of course—

Mr. Wooden: We proved it.

Trial Examiner Norwood: Answer it.

The Witness: I am not familiar in detail with all of the requests by the Federal Government. I know, in the vicinity we send cement in, the major or larger proportion of the requests are for destination prices.

34430 By Mr. Withrow:

Q. Does that also apply to requests from the State of Michigan and the City of Detroit?

A. It does.

Q. Mr. Russell, has the Peerless Company ever made prices—ever made price concessions below its own quoted price and if so, under what circumstances?

A. We have made quotations below our then existing published prices if that is what you mean by price concession.

Q. Mr. Russell, does your company use the Institute freight rate book?

A. I am sure that we make no use of the Institute freight rate book.

Q. Does your traffic department prepare any freight rate information?

A. Yes.

Cross-Examination by Mr. Wooden.

Q. Mr. Russell, did Peerless Company ever make any use of the Cement Institute freight rate book?

A. I have no knowledge of their ever having done so.

Q. Would you say they have not done so since your connection with the company?

A. I am quite sure they have not done so.

34431 Q. Have they received it from the Institute?

A. I believe our traffic manager has received the freight rate book.

Q. But you say he has not made any use of it?

A. I have carefully examined his method of handling his traffic work, and I am convinced that he makes no use, and has not made use of the Institute freight rate book.

Q. Doesn't even check it against the tariff or against any freight compilations that he may use, himself?

A. I am informed by him, or have been informed by him, there have been circumstances wherein he has been told that certain people have used that book, and he has checked his own freight rate information against that book; but my understanding of his use of that is in the determination of distant prices to advise our salesmen as to what the prices are to be, and quote the customer, but he does not use the freight rate book for that purpose.

Q. For what purpose has he used it, if not for that purpose?

A. The only purpose that I can—

Mr. Withrow: Your Honor, I object to the question.

The Witness: (Continuing)—Know of,—

Mr. Withrow: The testimony was just that he did not make use of it.

Mr. Wooden: Well—

34432 Trial Examiner Norwood: Yes.

Mr. Withrow: And now he is asking—

Trial Examiner Norwood: Objection overruled.

The Witness: The only purpose that I can know of, of his consulting the freight rate book would be to inform himself as to whether the rates in there were like the rates that he compiles for the use of salesmen, but I do not conceive of that as using the freight rate book.

By Mr. Wooden:

Q. Do I understand you that he has used the Cement Institute freight rate book for the purpose of checking in connection with advising the salesmen as to the delivered prices to be quoted?

A. I don't understand he has so used that book. He has informed me that he has not so used it that way.

Q. You do not know other than what he has informed you?

A. Yes. I know other than that because I have been in his office and I have examined his data sheets that he prepares from railroad tariffs and I have seen copies of instructions he has given salesmen, so that I would say, I have knowledge of how he prepares his own tabulations and sheets and books.

Q. And, as I understand it, he checks his own tabulations and sheets and books with the Cement Institute freight rate book?

34433 A. I didn't so state.

Q. I am trying to find out what the facts are?

A. I don't believe he does.

Q. What was it you said a few minutes ago about the third answer back, about the checking that he did, what kind of checking is it?

A. I said there had been instances—I believe there have been instances where he has referred to that book.

Q. For what purpose?

A. Probably for the purpose of informing himself what was published.

Q. And under what circumstances would he care to inform himself? You say there are some instances. What are the kind of instances where he would do that?

A. The only thing I can think of, and I know of no particular instances, but perhaps out of curiosity.

Q. You know he has done it out of curiosity?

A. I do not even know for sure that he has done it.

Q. Do I understand the Cement Institute freight book is of no value or use to your company?

A. We could dispense with ever having a Cement Institute freight rate book in our office without its affecting our method of doing business an iota.

Q. Did you ever consider the question of relative economy compared with the freight service you were providing for yourself?

34434 The Witness: No.

By Mr. Wooden:

Q. Will you tell me this: whether or not you do not use the freight book of the Institute at times to check against your own information, where you have reason to believe that the rates are different to a given destination as shown in the Institute book and the ones you use, yourself?

A. I do not believe that our traffic department, from my knowledge of the way the traffic book—traffic 34435 department operates, I do not believe they make any business use of the freight rate book of the Institute.

Q. Is it also—pardon me.

A. I make that statement and I am repeating myself

from my own personal knowledge of the way the traffic manager makes up his freight rate information.

He is an old railroad man, hired from the Michigan Central Railroad, and been with Peerless a long time, and he is very familiar with freight rates.

Q. Is it also your testimony that your sales department makes no use of the freight rate books of the Institute?

A. The sales department, as we are organized and have been organized since I have been with the company, depends on our traffic department for tariffs on railroads, and trucks, and does not make up these tariffs, themselves, or use them except through the sales department.

Q. Now, will you answer my question, please?

Trial Examiner Norwood: Read the question.

(The question referred to was read by the reporter.)

The Witness: Yes.

By Mr. Wooden:

Q. How many freight rate books of the Institute do you obtain?

A. I have never seen one myself, and I heard we 34436 had a copy in the office.

Q. Just one?

A. Yes.

Q. When I say your sales department, I include your sales manager. He makes no use of the Institute freight rate book?

A. I am sure he does not.

Q. I take it that your company, in its policy of selling at delivered prices, endeavors to make your delivered prices the same as competitors delivered prices at the given destination?

Mr. Withrow: I object to the question. There is no testimony in the record to the effect this company had a policy of selling at delivered prices.

The testimony in the record is to the contrary.

Trial Examiner Norwood: Read the question.

Mr. Withrow: He testified as to practice and said there was no policy.

Mr. Wooden: I will call it "practice" then.

Trial Examiner Norwood: Read the question.

(The question referred to was read by the reporter, as follows:

"Q. I take it that your company, in its policy of selling

at delivered prices, endeavors to make your delivered prices the same as competitors delivered prices at
34437 the given destination?")

Trial Examiner Norwood: Change that to "practice."

Mr. Withrow: The testimony was the "usual practice."

Mr. Wooden: I will say "usual practice," then.

Trial Examiner Norwood: Answer the question.

The Witness: We do not attempt to ma.., at any time, our price conform to the price of our competitors. We—

By Mr. Wooden:

Q. Do you attempt to make your delivered prices lower than your competitors?

A. We attempt to sell at any particular point of use at the last known price at that point of use; if that can be construed as making it the same, we meet it.

Q. In other words, the last known price of your competitor?

A. Yes.

Q. At a given point. And, do you not find that our delivered prices and theirs, at many destinations, have been the equivalent of a price at some basing point plus freight to that particular destination?

A. During the past several years in the area that we ship cement into, there have been several different methods of—apparently several different methods of determination of price at a destination.

Q. Yes, we have been over that. We had the
34438 blanket price in the lower peninsula of Michigan in 1937. Outside of that, haven't you found that destination prices are ordinarily the equivalent of some base price plus freight?

A. Ordinarily, the destination prices are the sum total of a price at some particular point at which—

Q. Base point?

A. (Continuing)—to which tariff—to which freight tariffs are added to determine the destination price.

Q. And those points you know are the basing points; do you not?

A. I know that that word has been applied to the practice of starting a base price to which freight tariff should be added, yes.

Q. Does your traffic department calculate for itself the

freight rates from the various basing points to all destinations?

A. It calculates for itself by use of railroad tariffs.

Q. From—

A. From a particular—

Q. From base points?

A. —from particular places.

Q. Other than your own mill?

A. Yes.

Q. How are you able to carry out your practice or make your practice effective, of meeting the destination
34439 prices of competitors unless your freight element, as calculated by your own traffic department, is the same as that shown in the Institute's book?

Mr. Withrow: May we have that question read again?

Trial Examiner Norwood: Read it.

(The question referred to was read by the reporter, as follows:

"Q. How are you able to carry out your practice or make your practice effective, of meeting the destination prices of competitors unless your freight element, as calculated by your own traffic department, is the same as that shown in the Institute's book?")

The Witness: I cannot see from my own understanding of our practices where our freight—our traffic department has any necessity of relying on the freight—so-called Institute freight rate book.

The railroad tariffs establish these rates. If we find some competitor on quotations in the field at a destination, we can always figure the freight rate back.

By Mr. Wooden:

Q. On the proposition of ascertaining price changes from reports in the field, how many price changes do you consider sufficient before you decide that a general change in price has taken place?

34440 A. How many price changes do I consider necessary?

Q. How many instances of field information?

A. One instance would certainly make our traffic department get awfully busy and pick up corroborating evidence and by the time we had picked up half a dozen quotations from as many different locations, we know that the pattern is changing and we continue on for—through-

out the day, and sometimes longer—to complete that pattern all over the territory.

Q. After you get the instance during that day and that figure into this pattern, you find that the pattern consists of a change in a certain base price, do you not?

A. Sometimes it confirms our first information, that either one or two or maybe more so-called basing points have had their—had the price changed.

Q. After you get enough instances to satisfy you on that, you then apply that pattern of base plus freight to the other destinations in your territory; do you not?

A. If we find no inconsistencies, we do.

Q. And the pattern applied may apply to many times more destinations than the ones you picked up as samples, so to speak, of your change in pattern?

Mr. Withrow: Could we have that question read? It is not intelligible to me.

Applied how? It doesn't make sense.

34441 Trial Examiner Norwood: Read it.

(The question referred to was read by the reporter, as follows:

"Q. And the pattern applied may apply to many times more destinations than the ones you picked up as samples, so to speak, of your change in pattern?")

Mr. Withrow: I object to that question. It is unintelligible to me, and there are a lot of terms in it—"applied." Should be applied by whom?

Trial Examiner Norwood: Objection overruled.

That pattern, when you check up, is it applied to more destinations than the ones you get more information from?

The Witness: As I use the term "pattern" I am using the general level of price as it may exist at the time the price has not changed, and as I understand your question, I would say we have probably, in the neighborhood of five hundred destinations, to which we would ship cement, and at the time that there would be changes in pricing in terms of selling cement, I do not believe that we would find it necessary to pick up quotations from each of those five hundred destinations.

By Mr. Wooden:

Q. Well, could you not meet—couldn't you pick these quotations, say, from a dozen destinations and then

34442 apply the pattern to five hundred; correct?

A. I do not see it that way with the way we operate. For example—

Trial Examiner Norwood: Now you—

Mr. Wooden: I would like a direct answer to my question.

Trial Examiner Norwood: Answer.

Mr. Withrow: Let us have the question and answer read.

Trial Examiner Norwood: Yes, read the question and answer.

(The question and answer referred to were read by the reporter, as follows:

"Q. Well, could you not meet—couldn't you pick these quotations, say, from a dozen destinations and then apply the pattern to five hundred; correct?

"A. I do not see it that way with the way we operate. For example—")

Mr. Withrow: I submit that is a direct answer.

Trial Examiner Norwood: Can't you tell us how you figure out other prices in the same vicinity from prices you then picked up? Do you go back to the basing point and then apply freights to the points you haven't heard from; do you do that or not?

Mr. Wooden: He said he did.

34443 The Witness: No, we do not do that way.

Mr. Wooden: Why, he said he did.

The Witness: We do not apply prices back to places we haven't heard from. We get information from every part of the territory.

By Mr. Wooden:

Q. Not from every destination in the territory?

A. Not from every particular crossroad station.

Q. After you get the information from, say, every part of the territory, you then apply the pattern, do you not, to every destination in your territory?

A. Unless there is some zone price established.

Q. Yes.

A. Unless there is two stations too close together to make a difference.

Q. You said a few moments ago, your traffic department got busy whenever it learned of a change in price. Is that the function of your traffic department or is it your sales department?

A. Our traffic manager makes up the quotations be-

cause he is familiar with these freight tariffs and he merely needs to get authority from the sales manager or myself and, in some cases, he has assumed that authority, knowing he would be right.

Q. Where does he get his information as to base prices?

34444 A. He has to figure that out when he gets the information as called in by the salesmen.

Q. This list of delivered prices that you keep up to date, who keeps that? Is that kept in the sales department or in the traffic department?

A. The traffic department handles that matter in our organization.

Trial Examiner Norwood: When you get to a good place for stopping, let me know.

By Mr. Wooden:

Q. When the traffic department ascertains a change in the pattern of price, does that then call for a change in all these destination prices that are kept in the traffic department?

A. Not necessarily all of them.

Q. Well, just—wherever there is a change in the base price, it changes all the destination prices controlled by that base; doesn't it?

A. I would say—I have never used the term "base" in my understanding of this price matter. I call it a "place" matter. If we are talking about—

Q. You know that the term "base"—"basing point" is used, don't you, in the industry?

A. I know that is used in the industry.

34445 Q. And you say—what you are saying of the equivalent of what is used in the industry in that respect, isn't it? In other words, you are using a different terminology which states frequently—it is referred to as basing price and basing point.

A. I am using a different terminology because it is a different thing than what I have been given to understand, and what I have been of the opinion for years was basing point system.

In our business, it does not seem to me we are using the basing point system, as I understand the so-called basing point system, and that is my reason for mentioning that.

Q. What do you call the system you do use?

A. I call it a—putting a price on our commodity at a particular place and—

Q. Which other people would call a "basing point"?

A. They might.

Q. And which—

A. And to that we add our costs and charges for transporting to a point of use, and that becomes—

Q. The delivery—

A. (Continuing)—And that becomes the price which we quote to the user and the price we quote to the user is also the amount of money we get for goods and services.

Q. You mean that the—you prepay the freight?

34446 A. Yes.

Q. How long have you been doing that?

34447 The Witness: Only within the last two months that we have been prepaying freight on all carload deliveries.

34448 New York, New York.
Wednesday, March 13, 1940.

34449 WALTER C. RUSSELL resumed the stand and testified further, as follows:

Cross-Examination (Continued) by Mr. Wooden.

Q. Mr. Russell, showing you your testimony yesterday on Page 34445, where you say, "I am using a different terminology because it is a different thing than what I have been given to understand, of what I have been of the opinion for years was the basing point system."

Will you tell us when and under what circumstances you were given to so understand?

A. My only understanding about the basing point system has come from reading about it, having it described, and hearing it discussed. I cannot recite any par-

34450 ticular instances of how I have been advised about the basing point system.

Q. Can't you tell us when you were given to understand you were not using a basing point system?

A. I wouldn't say that it has been any particular time. It has been an opinion formed by information and knowledge about the growth of the so called basing point system.

Q. How long or until what time did you continue to think your were using a basing point system?

Mr. Withrow: Your Honor, I object. The witness has never said he thought he did use the basing point system.

Trial Examiner Norwood: Objection overruled. He can clarify it.

The Witness: I don't know that we are using a basing point system. It seems to me that it would have to be defined as to what you mean by a basing point system when you ask the question.

By Mr. Wooden:

Q. No, it does not depend on what I think is a basing point system. It depends on what you stated in the testimony that I read to you and where you said you had been of the opinion for years it was a basing point system.

I want to know for how many years, and until what time you thought it was a basing point system.

A. May I see the question and answer?

34451 Q. (Counsel hands transcript to witness for examination.)

A. (Witness examines transcript.) My understanding for a number of years about the basing point system was the system that was described in the steel industry, when they had a so-called Pittsburgh plus method of determining price.

Q. In other words, when they had a single basing point?

A. Yes, when they—and industry, however, puts a price on a commodity at many different places over an area in which that commodity is distributed, and puts that price on the commodity at some stage in its travels between its origin and the mine and the place where it is finally used after having been processed and transported, that is considerably different—that sort of system is considerably different than the—what is called the basing point system, as I understood it.

Q. In other words, you never heard of a so-called multiple point basing system?

A. I have heard the term, yes.

Q. What I want to know is not what you thought about steel and the basing point of steel, but what you meant as to the period of time when you thought cement was on a basing point system.

34452 The Witness: I do not remember that I ever did have any conviction that cement was priced on a basing point system.

By Mr. Wooden:

Q. What did you mean by your language on page 34445, Line 7, where you said, "I have been of the opinion 34453 for years was a basing point system?"

A. May I see that, please?

(Mr. Leisure hands transcript to witness for examination.)

The Witness: What was the page again?

By Mr. Wooden:

Q. 34445.

Mr. Withrow: Line 7.

The Witness: (Reads transcript.) I was merely saying in that sense that I was using a different terminology because my conception of our present pricing system and the pricing system in the cement industry was different from what my understanding had been on the so-called basing point system that I have described to you earlier this morning.

By Mr. Wooden:

Q. You mean to say you were never of the opinion that cement was sold on a basing point system?

A. I never was of the opinion it was sold on the basing point system that I have described to you.

I have never, until this time, had to quibble with myself about the terminology used except that I did have that thought in mind about the difference.

Q. Merely the difference between what you described in the case of Pittsburgh-plus system and cement, do you mean?

34454 A. Yes, there has always been a difference in my mind about that, as I have grown to understand the methods of pricing of commodities of that type.

Q. You can't tell us when you began to think cement was not sold on a basing point system?

The Witness: No, I can't tell you that.

By Mr. Wooden:

Q. Has it been within the last two years?

A. No.

Q. Has it been within the last three years?

A. I don't know when, if ever, I have changed it, if I have changed it.

Q. You don't know whether you changed or not?

A. I don't think that I have changed.

Q. Now, with regard to your mill at Detroit. That is in the city limits of Detroit, is it?

Q. Is it within the switching district of Detroit?

A. Yes.

34455 Q. That means what in the way of rates from your mill to points within that switching district?

34456 The Witness: I do not know what the switching rates are. I do know that there are—there is some variation in the amounts. I know also that—

By Mr. Wooden:

Q. You mean, depending on the size of the car?

A. Yes, it would depend—in order to reduce freight rates to a barrel rate, it would depend on the size of the car shipped.

Q. And what is the—

A. And also it would involve, in some cases, transfer from one road to another that would change the cost of delivering the cement to the customer.

Q. What is the range of cost per barrel?

A. I do not know as I sit here. I would have to look at our records and find out.

Q. How large a percentage of your mill's business is done within the switching districts of Detroit?

A. I do not know that.

Q. You do not know whether it is twenty per cent. or ten, or forty, or what?

A. Well, one would have to have a particular time and a particular record of certain shipments in order to make any statement having any value. And I haven't that with me.

Q. Isn't it a substantial percentage?

34457 A. There is a substantial portion of our business shipped into the metropolitan area of Detroit. How much of that percentage is within the so-called switching limits, I do not know.

Q. Can you tell us what the percentage is within the Detroit limits without regard to the switching area?

A. I could tell you for the year 1939, approximately the percentage of shipments shipped—the percentage of

cement shipped by us in that year within a fifty mile radius of our plant.

Q. That goes beyond the switching area of Detroit, doesn't it?

A. Yes.

Q. Can't you give us some idea of what goes into Detroit as distinguished from the switching area?

A. I am sorry I couldn't do that because we would have to make a tabulation of our records. They are not set up on that basis.

Q. You have no idea?

A. No, sir.

Q. And you have no idea what the switching rate from your plant within the Detroit switching district is?

A. Yes, I have an idea.

Q. What is it?

A. I believe it is approximately twenty-nine dollars a car.

24458 Q. Twenty-nine dollars a car to anywhere within Detroit switching district?

A. Yes. Unless there is a transfer from one road to another.

Q. And then, what?

A. I think that they charge somewhere around seven or eight dollars, but I am not sure of the figure.

Q. Additional?

A. Yes.

Q. And the rate per barrel would depend on how many barrels there are in the car, I suppose?

A. That's right.

Q. You ship some cars of fifty thousand pounds or more?

A. Fifty thousand pounds would be twenty-five tons, would it not?

Q. Yes.

A. A minimum car would be slightly over fifty thousand pounds, I believe. We—

Q. How many barrels would that be?

A. Approximately one hundred thirty-two.

Q. Now, what is the rate from the Wyandotte mill plant into Detroit?

A. I do not know.

Q. It is outside the switching area, isn't it, of Detroit?

A. It is outside of the railroad switching area, I believe.

34459 Q. You base on Wyandotte, do you not?

A. Some of the prices that we are using at the present time, I believe, would be governed by the so-called Wyandotte base, or base price, as we call it.

Q. Are the prices in the Detroit switching area based on Wyandotte?

A. I think they are. I believe they are.

Q. And yet you can't tell us the rate from the mill at Wyandotte, on which they are based.

A. I cannot.

Q. It is more than the switching rate, isn't it?

A. I do not know. I believe, however, that it is, but I haven't the figures here or knowledge of them in my mind, at the present time.

In answering my last question, my assumption was you were talking about railroad rates.

Q. Oh, yes. Yes. Whatever the difference is between your switching rate into the Detroit area, and the Wyandotte rate into the Detroit area, you have the freight advantage there, do you not?

34460 The Witness: If the railroad freight rate from Wyandotte into, or to, some particular location in the Detroit switching area is greater than the switching rate that we have from our—or the freight rate that we have from our plant to that same place, the amount of money that we would net from a sale would be greater than the amount of money that would be netted from a similar sale, and shipment from Wyandotte.

However, it would be the same as a shipment from any other of the sidings in Detroit.

By Mr. Wooden:—

Q. Will you say that the freight from Wyandotte into Detroit is not as much as twenty-five cents a barrel greater than the freight from your mill into the Detroit

34461 area, to many of the points in that switching area?

A. Well, if there is a difference of—and there probably is some difference—I do not believe it would be as much as twenty-five cents per barrel difference—from my knowledge of the net derived from sales that would be considerably different than my understanding.

Q. Would you say it is not as much as ten cents a barrel?

A. Frankly, I do not know because I haven't figured those rates. It is handled by the Traffic Department. It

has changed so rapidly in the past several months that I am not familiar, at the present time, with what those rates or differences are in that particular locality.

Q. And you can't give them as of any period of time, not merely the present time?

A. I am sorry that I can't.

Q. You sell in Bay City and Saginaw?

A. We solicit business in those territories and those cities.

Q. You base your delivered prices there on Wyandotte?

A. As I understand the method of determining the price to quote a customer in to either Bay City or Saginaw, I do not believe that placed price put on the cement at Wyandotte would compete with the price that is placed on the cement at Bay City or Saginaw.

I do not remember which place there is a price put.

34462 I believe it is at Saginaw, however.

Q. When you say "placed," you mean—

A. Or so-called basing—

Q. So-called base?

A. —System.

Q. With regard to these blanket prices over the whole lower peninsula, that Huron put in, in 1937, do you mean to say that you got information at every destination in the lower peninsula before you concluded there was a blanket price in effect?

A. I don't think that I said that.

Q. No, I don't think you did, but I want to clear it up. How many destinations did you get the information from before you concluded there was a blanket price in at every destination?

A. I do not know how many it was. I do know we received telephone calls all morning, or nearly all day, from all of our salesmen telling about the information they were getting in the territory. How many dealers or contractors or builders supply people, or concrete products people, they talked with, or got information from, I am not in a position to know.

Q. Even though you got information from ninety per cent. of the destinations in the State, how would you know that the blanket price was in effect at the other ten per cent.?

34463 A. My reason and judgment would tell me that just the same as I would have a pretty good idea of

calculating sugar—calculating the price of granulated sugar if it were quoted on the markets at any given price.

Q. In other words, you think because the blanket price was in effect at a number of stations, therefore you could conclude the blanket price would cover every station in the lower peninsula?

A. We could, after we got all the information together that was available to us.

Q. In all of that time, do you mean to say you took no means of asking the Huron people a question as to whether there was a blanket price in effect?

A. I did not ask the question. I did not ask them the question.

Q. Do you know whether anybody in your company did?

A. It is quite possible that, after a day or so, that our traffic man would talk with the traffic manager of some other company, and possibly with the Huron Company. I do not—

Q. You don't know what happened?

A. I do not know that they did, but I know they are on committees and belong to the Chamber of Commerce organization that has to do with the Michigan Public Utilities Commission. I know they are friends, and it is not possible for me to say they had no conversation about a mat-
34464 ter of that kind.

Q. Did the price under that blanket quotation, advance at Bay City and Saginaw?

A. I don't remember if it advanced any place in the state. As I recall, however, it was below any other price at any place in the state, prior to the time it was put in. There may be some small exceptions to that.

Q. Would you say the same thing with regard to Bay City and Saginaw?

A. I believe it was equal to or below either of those places.

Q. And Detroit—how about Detroit?

A. It was a reduction of the then quoted or published prices existing at Detroit at the time it was put in.

Q. Now, with regard to this instance you testified to on direct examination about, Koe[redacted]oal Company—was it?

A. Koenig—K-o-e-n-i-g, I believe, is the spelling.

Q. Oh, I see.

A. Of the name.

Q. When did that occur?

A. The bids were taken some time in 1937. My confusion yesterday was occasioned by the fact that most of that cement was shipped in the year 1938 or the year following the time that the bids were taken.

Q. What part of 1937 were the bids submitted?

A. I do not know. I think it was sometime after
34465 the middle of the year.

Q. Now, do I understand that Koenig made a price on the same day that Huron announced a price reduction?

A. That bid was made by the Koenig Coal Company some short time before quotations were in the hands of dealers whereby the price was changed downward.

Q. By Huron?

A. I believe it was by Huron.

Q. You say a short time before. How short a time?

A. Well, probably only a few hours, depending on the mail service. Our own information in our office was based on reports that came to us from our salesmen about the post-marks shown on the announcements.

Q. Do you know what price per barrel Koenig quoted?

A. I don't remember the exact price.

Q. Do you know what price per barrel the new price announced by Huron was?

A. You mean, the new published price—

Q. Yes.

A. —To the trade?

Q. Yes.

A. I believe they were approximately the same or slightly lower than Koenig's bid. I don't know the exact figure.

Q. So Koenig wasn't making a price that was below the newly announced price of Huron?

34466 A. I do not believe so.

Q. Is that the case where there was a three hundred thousand barrels involved?

A. As I recall the incident, I think it was, although there were several bids taken about that time.

Q. You said there were many parallel incidents to that. Can you give us some others?

A. I remember buying cement from the Aetna Cement Company, or rather, our company bought cement from the Aetna Cement Company at a price below the existing pub-

lished quotations that were in existence at the time we purchased the cement.

Q. When was that?

A. I believe that was in 1931—1932, or 1933.

Q. That is when you were a contractor?

A. It was our company that bought the cement.

Q. On direct examination, on Page 34430, you were asked whether your company ever made price concessions below its own quoted price, and you said, "We have made quotations below our then existing published price, if that's what you mean by price concession."

When and under what circumstances have you made quotations such as you have described?

A. Particularly on certain state highway contracts, the price structure would be unstable and we would find that our competitors were quoting prices other than the
34467 published prices, and we have made concessions to hold some portion of the contractors' available business to ourselves.

Q. You mean, secret concessions, without publishing them?

A. They were not published to the trade with mailed announcements. They were generally known, however, in the construction industry.

Q. When did those instances occur?

A. Those have occurred two or three times during the last seven years.

Q. Now, what is the most recent case?

A. I do not know what is the most recent case.

Q. Since you came with the Beerless Company in 1933, how many general notices of price changes have you made?

A. I don't know.

Q. You had a list here, didn't you, the other day, of the changes in price that occurred?

A. There was a list shown to me but I never counted them.

Mr. Wooden: Is that list available, Mr. Withrow?

Mr. Withrow: The subject wasn't gone into on direct. The document was merely identified. I do not think we should go into it.

Mr. Wooden: The subject has been gone into on direct.

Mr. Withrow: Not on the subject of price changes in Michigan.

34468 Mr. Wooden: On the general question of price

changes of the price structure and departures from published prices, and all that, has been gone into.

Your Honor, I asked Mr. Withrow whether he would produce the list of price changes which the witness identified.

Mr. Withrow: Your Honor, it has not been offered in evidence, and is not a part of the record.

Trial Examiner Norwood: Well, until he uses it in some way, I think it is his privilege not to use it.

Mr. Wooden: I want to use it to refresh the witness' memory because he says he can't answer the question without it.

Mr. Withrow: Your Honor, the record is all full of testimony about price changes in the State of Michigan. I don't see why we should waste time on this subject.

34469 Q. What was the last general notice of price change that you can remember?

A. The last general notice was either late in January or early in February of this year.

Q. And the one preceding that, when was it?

The Witness: I don't know when the last price change was prior to that, because different announcements affect different parts of the area in which we distribute cement, and the result of the various changes affects the prices that we get, so that they are changing every week, according to our records.

By Mr. Wooden:

Q. You mean, your destination prices are changing every week at some destination, is that what you mean?

A. Some place in the area the effect is that they have changed all the time. The effects are—it affects our prices.

34472 Trial Examiner Norwood: Read the question.

(The question referred to was read by the reporter, as follows:

"Q: Do I understand that you favor the method that you use of quoting the delivered prices because the purchasers want to know what the cement will cost them delivered to the place of use?"

"A. I would not say that I favor any particular method, except that, of necessity, if I am going to sell cement, I must—make a price—.")

Trial Examiner Norwood: Finish your answer.

The Witness: —At the points of use or destination.

By Mr. Wooden:

Q. Well, is it your experience that purchasers prefer to have a price quoted delivered at the point where they want to use it?

A. Yes.

Q. Couldn't you quote any purchaser a price de-
34473 livered at the point he wants to use it without quoting it on a place other than where your mill is located?

A. We only quote a price to the customer at point of use. The method used in building up that price is something that customers are not interested in, within my experience.

Q. In other words, you think they are not interested in getting a lower delivered cost from one mill than from another?

A. They are interested in getting the lowest quotation they can possibly get for themselves.

Q. And if they can get one lower from another, you think they might be interested?

A. Certainly.

Q. Did I understand you to say you had made some shipments of cement by water from your mill?

A. Yes.

Q. Under what circumstances and in what instance?

A. I only remember one instance in the last seven years. There was some shipped by water prior to the time
I went with the company. Some Government work
34474 —the one I am familiar with was some Government work, I believe on a lighthouse structure in the—somewhere near the Sault Ste Marie, the upper Lakes. We furnished the cement and a small steamer came into our plant and we loaded it on that steamer and it was taken to the site of the work.

Q. Did you provide the transportation?

A. Without remembering all of the details, I believe that we arranged for the transportation and paid for the steamer.

Q. Did you quote price delivered at the point of use?

A. I do not remember.

Q. When was this?

A. Three or four years ago. It was a very small order involving two or three thousand barrels of cement.

Q. I understand your testimony to be that the price

policy of your company is determined by your sales manager but that you are responsible; is that correct?

A. I would say that is correct.

Q. I understand, also, there was one instance in which your company took price leadership; is that correct?

A. I believe so.

Q. When was that?

A. In 1933, shortly after I came with the company, we announced a change in published price in the Michigan area.

Q. Up or down?

34475 A. Up, I believe.

Q. Was that in the summer of 1933?

A. I believe so.

34477 By Mr. Wooden:

Q. Has one respect in which it has been important been in your ability to thereby meet the delivered prices of competitors at particular destinations?

A. With this method, or any other method that we used, we would have to meet the competitor at point of use or destination.

34479 Q. As a matter of fact, Mr. Russell, isn't it true that unless competitors use a common base or place to start from and a common place factor from that common base to a particular destination, that they couldn't make the delivered price the same because of the differences in transportation charges?

34480 The Witness: I don't think that is true. I believe that the manufacturer would always meet competition at the place of use.

By Mr. Wooden:

Q. Whether he knew—

A. Under any system.

Q. Even though he did not know the place of use?

A. Well, he wouldn't—

Q. Why does he have to know the place of use?

A. Because he wouldn't attempt to sell unless he knows the place of the customer or the place of use.

Q. That is the way, or the method, of quoting as insisted upon—that you know the place of use?

A. No, I can cite you an instance which will illustrate a variation from that.

Q. How can you quote a delivered price without knowing the place of use?

A. Either place of use or location of customer. I will add that.

Q. But, unless you know the location of the customer or the place of use, how can you quote a delivered price?

A. Well, you can't quote unless you know some
34481 body that you can locate.

Q. Isn't it a fact that the method of quoting delivered prices that you have employed has been of importance to your company, in part, because of its enabling you to meet the delivered price of other competitors?

A. If I understand your question correctly, this method of quoting prices is of importance to us just as any other method of quoting prices would be important to us.

We would have to know about it and how to use it.

Q. Forget all other methods and confine yourself to the method you used, and answer the question.

A. It is of importance to us.

Q. In part, because—

A. This method—

Q. —In part, because of the consideration I have mentioned?

Mr. Withrow: What consideration?

Trial Examiner Norwood: Well—

The Witness: I don't think so.

By Mr. Wooden:

Q. In other words, it has no relation in your mind to the question of whether your delivered price is competitive with delivered price of competitors?

A. I would not say that this is the best method, the simplest method, or the most complicated method.

Q. Will you answer my last question?

34482 The Witness: Of course, it has a relation to the method or system whereby you meet your competitor at the market place.

By Mr. Wooden:

Q. And you do not say that is of no importance to your company, do you?

A. I did not say it was of no importance to our company.

Q. Would you say it is of some importance to your company, then?

A. Certainly, any method.

Q. For that reason? For that reason?

A. Not for that reason, alone.

Q. In part?

A. It is a part of the pricing system and, of necessity, must be important, in part.

Q. For that reason?

A. For that reason to enable us to meet our competition?

34483 Q. Yes.

Trial Examiner Norwood: Read the question and let him answer.

(The question referred to was read by the reporter.)

Trial Examiner Norwood: Answer.

The Witness: I am very sorry to be confused by the framing of these questions—I will make—

Trial Examiner Norwood: Was your consideration of its importance based in whole or in part upon the reason you stated?

The Witness: I have never given that particular question consideration in my mind, as a part. It may be a part. If I were to consider it carefully, and analyze it, I might say that it was a reason, but I am not in a position to say it is a part, at the present time.

34491 By Mr. Wooden:

Q. As a matter of fact, haven't a good many of the emergency relief purchases been in larger quantities than some dealers were buying?

A. They have been in larger quantities than the particular dealer would buy in any one month or two months, but not in larger quantities than a group of dealers would buy over the same period of time that this cement

34492 would be used.

Q. In other words, you consider your dealers as a group or class in considering that question?

A. That's right. That accounts for a greater volume than these particular orders—our Government purchases.

Q. What did your sales manager say when he consulted with you about sending out an announcement of sales policy in February, 1935?

34493 A. I do not remember what he said. I remember that from day to day over a period of time, we had discussions about the subject; and he finally concluded that

it would be a good thing to send out that letter, and I had no objection to it, and the letter was sent.

Q. Did he bring to your attention that other cement manufacturers were sending out similar announcements?

A. Whether he brought it to my attention, I know that I had seen those letters that had been sent in by salesmen.

Q. Who was this Michigan Builders Supply Association secretary, whom you say, asked for a statement regarding sales policy?

A. I believe it was a Mr. Eckley, or some name similar to that, who has always advocated that we send statements to him and builders supply dealers.

Q. Did you hear from him about this announcement of policy you sent out in 1935?

A. I do not know.

34494 "Did you say what differences of opinion regarding this classification of trade and definition of a dealer that was announced by cement manufacturers you had?"

Trial Examiner Norwood: Did you mention that at all?

The Witness: I do not believe I made any statement about what the differences of opinion were.

By Mr. Wooden:

Q. No, that is what I am asking now, what they were. That was preliminary.

A. I do not know about particular things except this, that a secretary of the dealers supply association has always advocated that dealers handle all cement and all orders. That being impossible, we are always having arguments and differences with them as to what we can allow the dealer to handle or—

Q. Well, that was the dealers' position with regard 34495 to Article 11 of the Code, wasn't it?

A. As I recall it, that was the position that they took.

Q. You didn't give the dealer all Government business that you handled prior to the Code, did you?

A. No.

Q. And you didn't give the dealer all the Government business you handled after the Code, did you?

A. No.

Q. Your announcement in 1935, I take it, stated the classes of business that you would—Government business

that you would sell to the dealers—I mean through the dealers, and the class of dealers you would sell direct?

A. I believe that was a general statement we made which classified the dealers as far as possible.

Q. Both your announcement of the classes of trade and definition of dealer, the same as that put out by other cement manufacturers?

A. I do not remember.

Q. You took no thought of that at the time you stated that?

A. We were not considering the other manufacturers except as competitors and I can't say that we gave that particular phase of the problem consideration.

34499 Q. Now, regarding Commission's Exhibit 45, the letter of Mr. Johnson of the Aetna Company, about a meeting in Chicago in December, 1935.

I believe you said you were present there?

A. I was present at the meeting I described in, I believe, the Blackstone Hotel in Chicago.

Q. What was the occasion for that gathering?

A. I entered that room at the invitation of Mr. Johnson, and I only know of my own understanding of what that group was there for.

Q. How did you happen to be in Chicago at the time?

A. I was at a meeting of the Portland Cement Association.

Q. Do you recall the presence of these men named in Commission's Exhibit 45-A?

A. I have no reason to believe that those men were not there. I know that there were eight or ten men came in to the room with Mr. Johnson—I assumed at Mr.

34500 Johnson's invitation.

Q. As a matter of fact, you don't know whose invitation it was, do you?

A. I do know Mr. Johnson invited me in there.

Q. But, as to the other, you don't know about them?

A. I do not know about the others.

Q. Did any one preside at the meeting?

A. I don't know that the meeting was that formal. I believe Mr. Johnson sat at the end of the table and read either that letter or a very similar letter, and I remember that circumstance.

Q. Who took the lead in the discussion, aside from Mr. Johnson?

A. I personally do not remember of a discussion. Mr. Johnson read the letter and—

Q. Did you say anything?

A. I do not remember that I did enter into any discussion, and I wouldn't say that I didn't say anything.

Q. Did anyone else say anything?

A. I do not remember that there was silence, but I don't know of anything being discussed.

Q. You can't remember anybody saying anything except Mr. Johnson reading the letter; is that right?

A. That's the only definite recollection I have of the group around the table.

34501 Q. Wasn't that a discussion about trade matters or—other than Johnson's reading the letter?

A. Not that I remember. It was pretty unusual, the situation was. I know I had a feeling of embarrassment. And Mr. Johnson, in reading that letter, gave me the impression that he was talking to Oscar Lingeman and Harold Cree, to get them to do something he had been unable to get them to do, and was apparently using that means of impressing on them the necessity of doing something.

That was my own feeling at the meeting. I know I was very much embarrassed to witness the procedure as it was carried on.

Q. Didn't it impress you as peculiar, Mr. Johnson should have his competitors to hear him lay down the law to his subordinates?

A. Yes, sir.

Q. It did. Had you ever before attended any gathering at which Mr. Cree or Mr. Lingeman's methods were discussed?

A. I don't remember—did you say meeting or gathering?

Q. Well, meeting or gathering.

A. Mr. Cree and Mr. Lingeman's methods were discussed from time to time over a period of years by people interested in the industry, at lunch, at groups, in hotel lobbies. I do not remember of any gathering that could be called a formal meeting at which their methods

34502 were discussed.

Q. This was not a formal meeting either, was it?

A. This was quite an unusual gathering. I wouldn't call it a formal meeting.

Q. Can you describe any other meeting or gathering at which these methods of Cree and Lingeman were discussed?

A. I do not remember of any particular time or meeting, or any particular man that may have talked about it.

Q. Where were such meetings?

A. I don't remember such particular meetings.

Q. Can't you—

A. I do know this—as I—

Q. Were they in Detroit or Chicago or where?

A. In all probability, the method of Aetna Cement Company and all other cement companies were discussed by men that attended Portland Cement Association meetings—men that met on the street or that have luncheon together,—because it is an industry matter in which we are always interested—methods of dealers, truckers, and anything pertaining.

Q. Do you recall some meetings were held in Detroit?

A. I remember of attending budget meetings for the Portland Cement Association for the purpose of determining promotional expenses.

I remember attending—

Q. Well, I mean meetings about the Cree-Linge-34503 man-Aetna matter.

A. No, sir. I don't remember of ever attending a meeting about that.

Q. Other than this one in Chicago?

A. Other than that one which was definitely an inter-company matter.

Q. Didn't you pay the bill for a luncheon meeting of competitors that discussed the Aetna situation in Detroit?

A. I paid no bill of any luncheon meeting of competitors.

Q. Did you pay a luncheon bill at which various cement representatives were present?

A. I may have paid a luncheon bill sometime in the past seven years, at which various competitors were present, but never any meeting of competitors at lunch or at any other meeting for the purpose of discussing or discussing the Cree and Lingeman or Aetna Cement Company business, or matters pertaining to them.

Q. You say you didn't pay any bill of such character to the Book-Cadillac Hotel in Detroit?

A. Not to take them—if you are referring to the testimony about a dinner that I attended at the Book-Cadillac.

I am not sure whether myself or Mr. Baker or Mr. Johnson or Mr. Calvin paid the bill at a dinner that the four of us ate in the Blue Casino at the time Mr. Johnson came to Detroit, and I was informed of his being in Detroit, and either myself or Calvin suggested that we have
34504 Mr. Johnson and Mr. Baker get together for dinner because we thought we would enjoy each other's society.

Q. What time was that you say he came to Detroit?

A. It was three or four years ago. It was the time—at the time I first learned Ben Calvin had been employed by Mr. Johnson.

I will say this about that dinner, no business matters were discussed. Neither Cree nor Lingeman were discussed. It was a social dinner.

Q. That was after Mr. Cree and Mr. Lingeman had been let out?

A. I would assume they had been let out as Mr. Calvin was probably known to have the job as general manager of the Aetna Cement Company.

Q. Referring to Respondents' Exhibit 2442-B, being your form for determining the status of the dealer, what is meant by the phrase, "Whether they were considered ethical or not"?

A. That phrase has to do with a man's general reputation in the community, and whether he is the kind of a man we feel it is desirable to have associated with us in business.

Q. Isn't it also referred to commonly in the dealers' trade as having to do with the man's relations with his competitors?

A. I wouldn't say that except as a man's relation with his competitors is a part of his relationship with
34505 anybody in a community.

Q. What difference does it make to you in recognizing a dealer whether or not he maintains prices?

A. It makes quite a lot of difference to us. A man who, in a small community, particularly, or in a small neighborhood uses our cement, we will say, as a price leader, can very easily cause resistance to other sales. We are always interested in the competitive practices of a dealer.

Q. You mean—

A. To whom we sell cement.

Q. You mean competitors of a price-cutting dealer put pressure on you?

A. No, I wouldn't express it that way.

Mr. Wooden: I beg your pardon. I shouldn't have used the phrase "put pressure." I criticized Mr. Withrow yesterday for doing it, and now I am doing the same thing myself.

By Mr. Wooden:

Q. You mean competitors of a price-cutting dealer will make objections to you?

A. No, I wouldn't put it that way. If it will be helpful, I can give you one instance of a—

Q. I don't want you to go into great detail. However, I do not mind your explanation.

34506 A. We have recently, in the past year, refused to ship a man in Toledo who has ordered—who has wanted to buy our mortar cement—not our Portland cement. He is not set up well to furnish the trade with builders' supply materials, and he found an opportunity, as he thought, to buy mortar to use as a price leader in the City of Toledo—incidentally, he was just outside the City of Toledo—use it as a price leader in sand and gravel and other products which he handled, using mortar cement as what we call a price leader.

We were not willing to ship the mortar cement to him, under those circumstances, because that mortar cement would have come in competition with people whom we considered to be regularly in the builders' supply business in Toledo, and whose situations would be harmed by such circumstances.

Q. And did they object?

A. I do not remember that they objected. I do remember our salesman, in the territory—he is the man that told me about the situation—and I O'K'd the refusal of the sales manager.

Q. As I understand it, you recognize dealers in different localities or communities—in some localities or communities that you wouldn't recognize in other localities or communities; is that right?

34507 A. I think that is correct because the character of the community determines the character of business done by the dealer.

Q. But you have one over all definition of a dealer that would, of course, have to be applied and interpreted,

depending on the local conditions—varying local conditions?

A. I think we have a general over all interpretation of a dealer or definition.

Q. You testified on direct that your standard Portland cement exceeded the minimum standard specifications for Portland standard cement.

How much do they exceed it?

A. That is—involves a technical answer I am not in a position to state.

Q. Can you state it in terms of tensile strength?

A. I can only state it in—by saying that the specifications for tensile strength and compressive strength of certain brickets made with cement exceed the minimum requirements of standard specifications.

Q. By a substantial margin?

A. By a good enough margin so that we are safe in knowing that we are always—that we will always meet or exceed specifications.

Q. As an engineer, don't you know how much your standard exceeds the minimum requirements?

34508 A. As an engineer, when I check the tabulations and records at our laboratory, I can understand them and interpret them and know at that time how much they exceed any particular specifications in a bin of cement covered at a particular time, and with certain laboratory procedures made at a particular time.

Q. Has your company advertised the fact that its standard cement exceeds the minimum specifications?

34510 The Witness: We do not advertise through any magazines or newspapers anything pertaining to our specifications.

34513 Q. Now, referring to your testimony on Page 34431 of yesterday afternoon, on cross-examination, Line 12,—11 and 12—you say there that your traffic manager had told you that certain people have used that book, meaning the Cement Institute freight book.

Mr. Withrow: What page was that?

Mr. Wooden: 34431.

The Witness: May I read that question and answer?

By Mr. Wooden:

Q. My question is, who were the certain people referred to?

A. The assistant to the traffic manager may have re-

ferred to that book, and other people in the office are the people that I had reference to when I said certain people.

Q. You mean, certain people in your own traffic department have used the book?

A. I think they may have used the book or referred to it.

Q. What is the meaning of your testimony on the same page, Lines 14 to 17, where you say your understanding of your traffic manager's use of the Cement Institute freight book is in the determination of distant prices to advise our salesmen as to what the prices are to be, and quoted it to the customer, and you immediately go on to say:

"But he does not use the freight rate book for that purpose."

A. He uses—

34514 Q. Will you reconcile that statement for me? It seems to me to be somewhat self-contradictory.

A. If it appears contradictory, my intention was to state that he uses freight tariffs as published by the railroad to determine those prices.

Q. But you also said that you understood he used it in the determination of distant prices to advise our salesmen as to what the prices are to be?

A. If I so stated that, I will correct myself in this way: I do not know that our traffic manager has ever used the freight rate Institute book or Institute freight rate book to determine what prices to quote customers.

Q. And now you want to change this statement, yesterday, that you understood that he used it in the determination of distant prices to advise our salesmen as to what the prices are to be?

A. There is a contradiction in that statement in that I stated he used freight tariffs.

Q. There is the contradiction—

34515 *Redirect Examination by Mr. Withrow.*

Q. Mr. Russell, just a moment ago you said that someone in your company may have used the Institute rate book. Do you know of any instance where it has been used?

A. I do not know of anywhere it may have been used and when I used the word "used" I said that they may have referred to it, or should have said that they may have referred to it.

I do not know that they have.

Q. Do you know of any instance where the Institute rate book has been used in any way in either shipping or pricing cement?

A. The Institute rate book is not used in our organization in determination of prices.

Q. Or shipping?

A. Or shipments, or in our—

Q. Do any of your salesmen carry copies of the Institute rate book?

A. They do not.

Q. Would you tell us, Mr. Russell, briefly, why you usually quote and sell at delivered prices?

34516 The Witness: We quote delivered prices because that is the only way I know of to sell our commodity; namely, to the customer at the point of use or where he desires to have the cement delivered.

And also, so far as I know, it is the only method that he can have to compare our price with competitive prices. I know further that as a buyer of cement in years past, it was necessary for me to compare the price at the place where I would use the cement, and I desired to buy cement on that basis, and have price quoted to me on that basis.

34517 Q. Mr. Russell, does the salesman, in quoting the price in the City of Detroit, have any occasion to calculate what the price is, or does he know what the delivered price is?

A. He knows what the delivered price is at any given time because he is so advised what to quote by the sales manager in the office.

Q. Mr. Russell, Mr. Wooden asked you about prepayment of freight. Prior to the issuance of the complaint, did you prepay the shipments on all shipments made by truck from your mill?

A. Yes.

Q. And that represented a substantial portion of your shipments, did it not?

34518 A. That represented more than two-thirds of our volume of shipments.

Q. Now, with reference to the time when the Huron Company initiated a flat price for the State of Michigan, would you tell us whether you know if your traffic managers consulted with anyone?

The Witness: Our traffic manager did not consult with the Huron Cement Company prior to any price change of that kind. My answer this morning was to the effect I did not know whether he had talked with anybody in the organization subsequent to the time of that price change.

34519 Q. Mr. Russell, Mr. Wooden asked you about other instances of sales of cement or quotations on sales of cement below the current quoted prices.

Could you give us any additional—could you tell us whether, from your experience during the last ten years, there have been any other instances than the ones you specifically referred to?

34520 A. I believe there have been other specific instances where cement has been sold at less than the then existing published prices.

Q. I will call your attention to one purchaser, take the City of Detroit. Would you tell us what you know about the purchases by the City of Detroit during the last ten years?

34545 Mr. Wooden: Mr. Withrow spoke about one hour with reference to going over the portions of the stipulation which he said we would save so much time on. The witness covered the portions of that stipulation which were relevant in less time.

We spent more than an hour debating that stipulation. I want to say this, Mr. Withrow's position is clearly enough stated, that they won't tell whether or not—or they can't tell now, about further witnesses from the Peerless Company.

I merely say this, if your Honor please, if you cannot and will not impose some such rule as I move for, then I don't see there is anything your Honor can do towards expediting this case. You are helpless if you can't

34546 do that much.

34548 CHARLES L. HOGAN was thereupon called as a witness for the Respondents and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Leisure.

Q. Mr. Hogan, you are president of the Lone Star Cement Corporation?

A. Yes.

Q. And that corporation has its principal office in New York City?

A. Yes.

Q. And it was formerly known as the International Cement Corporation; is that correct?

A. Right.

Q. How long have you been president?

A. Since November, 1933.

Q. And whom did you succeed as president?

A. H. Strucknann.

Q. Was that your first connection with cement—let me ask you, what was your first connection with the cement industry?

34549 A. I entered the cement business in 1910, as a traffic manager for the Lumbermen's Cement Company of Kansas City.

Q. Were you with the Lumbermen's Cement Company—how long did it last?

A. I think about—for about two years.

Q. What happened then?

A. It went out of business.

Q. What was your next connection?

A. With the Altoona Cement Company.

Q. And what period did that cover?

A. I think that ran from about 1912 to about 1919, 1920.

Q. And what happened to that company?

A. It was finally liquidated through the State Courts in Kansas.

Q. And who was the receiver?

A. I was.

Q. What was your next connection, Mr. Hogan, with the cement business?

A. In 1921, I accepted a position with the International

Cement Corporation as their manager of their subsidiary, the Cuban Cement Company at Havana, Cuba.

Q. Was this Cuban company connected with the International Company?

A. Subsidiary, yes.

Q. And your next connection with the industry?

34550 A. Well, I have remained with the International—the Lone Star, ever since, but I was transferred from Cuba to Albany, New York, in 1924, and made vice president and manager of the Knickerbocker Portland Cement Company, which was also a subsidiary.

Q. How long did you remain with Knickerbocker?

A. Until, I think it was, 1926, in November, I was elected a vice president of the parent corporation.

Q. And that is International?

A. That is International, yes, sir. Now, Lone Star.

Q. I believe you told us you succeeded Mr. Struckmann in 1932?

A. 1933.

Q. As president of Lone Star?

A. Yes.

Q. Mr. Hogan, do you recall ever having any conferences with a Mr. Duffy, vice president of the Lehigh Valley Railroad?

A. I do not.

Q. Has he ever called at your office, to your knowledge?

A. Not to my knowledge.

Q. You say not to your knowledge. Would you have been available—I mean, would you have known about it if Mr. Duffy had called?

A. I know Mr. Duffy has not been in my office. It 34551 is possible he has been in the traffic department.

Q. Now, the record shows, with respect to some of its mills, Lone Star had a fifteen cent surcharge, Mr. Hogan, over its mill base for deliveries made to customers' trucks.

What was the purpose of that fifteen cent surcharge, in your case?

A. To cover the extra expense and annoyance we had with trucking.

Q. Was it your purpose, or did you intend, or expect such a charge would reduce truck deliveries?

A. No, I don't think it was the intention.

Q. As far as you personally are concerned, did you ever

have any understanding or agreement with your competitors concerning such a surcharge?

A. No.

34553 Q. Mr. Hogan, I want to ask you again whether or not you ever made the statement that the best 34555 way for building supply dealers to achieve stabilization would be by obtaining an agreement among cement manufacturers to adhere strictly to an arbitrary surcharge on trucks loaded at the mill, and I want to know whether or not you made such a statement, or whether you stated such an opinion, and whether or not you ever stated it at any time, or whether you ever stated it at any place.

The Witness: The answer to all three angles of it is—no.

By Mr. Leisure:

Q. Mr. Hogan, can you tell us whether the representatives of the Lone Star Company, to your 34556 knowledge, have any meetings with representatives of competitors, dealers associations, or railroads, on the subject of trucking?

A. Not to my knowledge, no.

Q. And if important matters of that kind were taken up by your representatives, would it have come to your knowledge, as president of your company?

A. Yes.

Q. And would your company have any object in taking up matters of that kind in that way, Mr. Hogan?

A. No.

Q. To your knowledge, Mr. Hogan, did your company have any agreements or understandings with any of its competitors, dealers or dealers associations, relating to trucking in any way?

A. No.

34560 Q. Has your company, to your knowledge, ever had any agreement or understanding with any of its competitors, concerning terms of sale or discounts?

A. No, no agreements whatever.

Q. Or as to any definition of cement dealer or to any application of such definition?

A. No, we always had our own definition, which we used for a great many years. In fact, the definition has changed little since I came into the industry.

Q. Or as to classification of business into types?

A. No agreements with anybody, no.

Q. Or that Lone Star would sell through any certain dealers?

A. No.

Q. The record also shows, Mr. Hogan, you participated in some conferences which led to the organization of the cement institute.

What was your participation in any preliminary matters for the formation of the Cement Institute?

A. I was one of the committee who put together the—tried to work up an Institute, early, I think, in June or July of 1929. That followed a speech made by Mr.
34561 Humphrey of the Federal Trade Commission at a meeting of the Portland Cement Association in May of that year, in which Mr. Humphrey had rather encouraged the industry to form a trade association, set up rules and methods of doing business, and seek a trade conference with the Federal Trade Commission.

That meeting—Mr. Struckmann, our president, was present at that speech by Mr. Humphrey, and became very enthusiastic about the idea. He had felt, ever since the start of the old cement case, when they stopped sending around statistics and all that, that there was a great deal of information needed that was lacking for a man to properly conduct his business; and after the decision of the Supreme Court in that case, permitting the distribution of certain statistics and checking contracts, and all that, that something of that kind would be very helpful to the industry.

But, nothing definite was ever done about it.

Mr. Struckmann discussed it once in a while with us until after Mr. Humphrey made his speech, and they then tried to get this Cement Institute, or what was later called the Cement Institute, organized.

As I say, I was appointed on that committee, and I think in the preliminary work, I remained on the committee.

Q. And did you, at that time, have any discussion with Mr. Struckmann, as to whether or not a trade prac-
34562 tice conference should be held or would be beneficial?

A. That was one of the things he was enthusiastic about after hearing Mr. Humphrey's speech, one way they could set up a method of cooperation with the Department of Commerce in order to establish a method of business that would be sound and satisfactory.

Q. Was a committee then organized, you say?

A. The committee was organized right after that talk by Mr. Humphrey. That is my best knowledge and recollection.

Q. And that was to work on this problem?

A. Yes, that was to work on this problem.

Q. Who were the members of the committee?

A. Blaine Smith, I think was chairman of it. There was a man connected with the Atlas Company; I think his name was Hulsardt. There were one or two others. I was on it. I don't recall now who the others were.

I think Coogan. I'm not sure, but I think he was.

Q. I don't think I asked for the date. When was this committee formed?

A. I said following the Portland Cement Association meeting in May, 1929, so it was June or July of that year when we started.

Q. Did the Committee undertake any activities with respect to trade association work?

A. The first thing they did was to employ counsel 34563 to guide in the work of trying to organize a trade association.

And then they got together and had, I recall, a meeting at which the general setup of the thing was—as to furnishing statistics and one thing and another, was pretty well agreed on.

But when it came to a Code of Ethics, that was the matter of a great deal of discussion, and was not agreed on at that time. I am not clear as to just how long I served on that, because when the Institute was organized, we were not members.

We didn't go into the first organization.

Q. You mentioned a Code of Ethics. How did the question of Code of Ethics come up?

A. It was one of the things that we necessarily had to have if we were going into a trade practice conference with the Department of Commerce for the purpose of setting up ways of doing business.

It was a basis we would have to work from. The matter of supplying statistics, and all those things, the permission or the right to engage in that activity, was clearly set out in the Supreme Court decision.

Q. You said, Department of Commerce?

A. I think that is what it was, yes, department of Commerce. Or Federal Trade Commission, I believe, we were to go for a Trade Practice Conference.

34564 Q. And can you tell us now what the attitude of the committee was concerning the necessity of having this Code of Ethics?

A. Well, some of them thought it was a very necessary part, and, I think, all of them felt before we could get ready for a Trade Practice Conference, we would have to get part of the Cement Institute set up.

But the important thing was to get the Federal Trade Practice Conference—I am talking about our company—to get the industry to organize so that we could shape the thing up for a Trade Practice Conference.

Q. In view of what you said, on what basis was the Code of Ethics prepared, if you know?

A. You mean as to details or—

Q. Yes.

A. I don't recall that.

Q. Do you recall, in any general way, what you were to include, or what you were not to include? For instance, were you to include terms of discount, and so forth?

A. No. What was to be included there was simply the practices that were generally being followed by the industry in the sale of their cement. That is, what was to be followed.

But the terms of discount, bags, payment for bags, and such things were all out of it, because they might 34565 have had some bearing on price.

Q. You said you didn't know just how long you were on the committee. Can you tell us when Lone Star became a member?

A. We joined—

Q. And joined the Institute?

A. I think we joined in January of 1930. I am pretty sure that was the date, January 1 or January 2, something along in there, 1930.

Q. Were you one of the organizing members?

A. I was on that original committee. We were not in on the organization of the Cement Institute. We were not present.

Trial Examiner Norwood: Did you ever hold a Trade Practice Conference?

The Witness: No, no. The Trade Practice Conference was never held.

By Mr. Leisure:

Q. Why, Mr. Hogan?

A. My reason is that— My recollection is that the attorneys who were handling that, and the members of the Cement Institute handling it, were not encouraged by the Federal Trade Commission, or Department of Commerce, or whatever they were to work with.

While they had been previously approving those
34566 Trade Practice Conferences, they had seemed to grow a little cold towards the idea.

The time didn't seem opportune to present it. In fact, I don't think it was ever presented. I am sure it wasn't. That continued all during the time we were members in 1930, the agitation for that.

Q. How long did Lone Star remain a member?

A. My recollection is it resigned in September, 1930. We were in about nine months.

Q. Why did you resign?

A. Well, the thing—it was discouraging from the start. We were interested very strongly in the gathering of statistics that would be helpful in allowing us to lay principles for running our business, but it soon developed that there were some members out, or some of the members of the industry didn't join, so consequently, the statistics were not of much value.

Hence, there were important facts and figures missing. The other thing was the Trade Practice Conference which we had been enthusiastic about as giving an opportunity to cooperate with the Government never developed; in fact, we were told, I think, along in August or July, somewheres around there, probably we couldn't get a Trade Practice Conference.

We wouldn't have one. So the Institute began to
34567 dwindle away. Different members began dropping out and we dropped out in September of that year.

Q. Did your company subsequently rejoin the Institute?

A. Not until the N. R. A. We joined it then.

Q. And what were your reasons for rejoining, Mr. Hogan?

A. Well, our reasons for rejoining—we felt under President Roosevelt's N. R. A., it was going to be necessary—in fact, I think the public press and some advice we had—it appeared to make it necessary there would be a trade association under which a code of ethics would be prepared, or a Code Authority set up, and an approach made to the Government to have such Code approved.

It was necessary to have some ground on which to get that started.

Q. Now, between the fall of 1930 and 1933, I think it was, you said when Lone Star was not a member of the Institute, did your company subscribe for any of the Institute's services?

A. Not that I recall, unless it was the freight rate books. We may have subscribed for that during that period.

I think we did. I think that is when they began to issue those books, I'm not sure. The freight rate books were not a part of the original plan of the Institute.

That came in afterwards.

Q. Did your company, to your knowledge, Mr.
34568 Hogan, have any agreements or understanding with the Universal Atlas Company, or with any other company, in connection with the allocation of business relating to the Colorado River projects in Texas?

A. Absolutely not, no, sir.

Q. Are you familiar with the letting of February 10, 1936, for cement to be used at Hamilton-Arnold Dam?

A. There were three or four of the lettings. I am not familiar with any particular one. I know each time one came up, they discussed with me the bidding. I do not know just which one it was.

Q. Who would discuss that with you?

A. Mr. Koch.

Q. To your knowledge, did any of the representatives of your company have any conferences or discussions with representatives of other bidders concerning the volume on which any of the companies would bid?

A. I never heard of it. I am sure that never took place.

Q. Was Lone Star awarded any business under this letting?

A. We didn't get any business under any of the Colorado River lettings.

Q. Were you low bidders in connection with any of the lettings relating to the Colorado River projects?

A. We were low bidders on one project calling for three hundred thousand barrels of cement. Now, I
34569 think that was a part of the Colorado River development. It came along there about the same time.

But the job was readvertised, and on the second letting the Trinity Company got the job.

We didn't get anything.

Q. I think you have already told us you were not, to your knowledge—your company had never entered into any understanding or agreement with competitors concerning allocation of business or any shipments; is that correct?

A. That is correct.

Q. Do you know of that question ever coming up at any time, other than during the N. R. A., Mr. Hogan?

A. The N. R. A. was the only time it was ever brought up.

Q. Was any agreement reached, so far as you were concerned, at that time?

A. There were as many different plans as people present, I think. There was nothing like an agreement.

Q. Now, did you, at any time, have any discussions concerning sales made by the Aetna Portland Cement Company to the Indiana Farm Bureau?

A. When I was in Indiana, in April or May, I think, I have forgotten the year—I think 1936 or 1937—our vice president in charge out there, Mr. Pierson, showed me a copy of the Aetna Cement Company's sales policy which they had distributed among the trade. And he called
34570 my attention to the fact their policies were similar to ours.

They were going to sell only through established dealers, and at places where they had yards. He said, in spite of that announcement, they are selling the Indiana Farm Bureau at a number of places where they have no yards, and are selling direct and not selling through dealers, and they are creating quite a furore among dealers.

He said it was not a great amount of cement, but it was creating quite a quarrel.

I said you explain that to Mr. Koch; I am not interested. It happened the following month there was a meeting of the Portland Cement Association at the Waldorf Astoria in this city, and we brought in all of our vice presidents, and Mr. Pierson came.

Mr. Pierson, one morning just before I went over to the meeting, again brought up that subject, and he and Koch were discussing it in my presence.

After I left them and went over to the meeting, I ran into Mr. Johnson of the Aetna and I thereupon mentioned the thing to him. I said our Indiana man tells me you have

got one announced method of selling in Indiana which you are not following; you are selling only to people who are established dealers, according to your announced policy, but what you are actually doing, is selling
34571 to the Indiana Farm Bureau, where they are not dealers.

He tried to discuss it with me, and I said that is all I know about, I can't discuss it. I don't know anything more about it. It has been reported to me by our man in Indiana.

I then went into a committee meeting and I thought the matter had been disposed of, but when I came out of the meeting, I found Mr. Johnson and Mr. Cree and, I believe, Mr. Lingeman, although I am not sure whether he was present or not—all of the Aetna Company—waiting for me.

They began to question me.

Q. Did Mr. Cree have anything to say?

A. He was the one that started the conversation. He said Mr. Johnson told me you had mentioned the Farm Bureau sales, and I said, yes. The first thing he said was, what you want to do is keep us from selling the Indiana Farm Bureau. I said, not on your life, I have no interest. I just told Mr. Johnson what our vice-president told us about what kind of sales policy you have announced, and just what was going on.

Mr. Johnson said, I want to get this straightened out. He said, where are they dealers. I said, I haven't any interest in it at all, and I haven't the least knowledge of where they are dealers.

34572 Then he said, who in your company would know?

And I said, Mr. Pierson, in charge of our Indiana district, would be the man for you to talk to.

He said, could Mr. Cree speak to Mr. Pierson. I said, certainly; he is at this meeting, probably he and Mr. Cree could get together at the meeting.

But Cree said, not then, but probably he would see him later.

I said, that's all—I know nothing about this detail at all; I couldn't discuss it.

Q. Aside from what you have told us, Mr. Hogan, did you, at any time or in any way, ever endeavor to persuade the Aetna Company not to sell Indiana Farm Bureau?

A. Absolutely not, no.

Q. Then did you have any subsequent discussions on this subject?

A. I had none whatever with anybody.

Q. Now, in connection with this discussion which you have mentioned with Mr. Pierson and Mr. Johnson, Mr. Cree, and Mr. Lingeman—

A. Pierson wasn't present. Johnson was.

Q. In all these discussions you had, was any mention made of the price at which Aetna had been selling?

A. No, there was no question of price whatever involved.

Q. I think you have already told us, your com-
34573 pany, to your knowledge, has never had any agreement or understanding with any of its competitors as to how and at what point cement should be sold to dealers; is that correct?

A. That is correct. We have no such agreement.

Q. You say you haven't. I want to ask you if you have ever had any such agreement?

A. No, no.

Q. Now, did you, Mr. Hogan, ever have any conversations with Mr. Johnson or anyone else concerning Mr. Cree's discharge from the Aetna Company?

A. Why, no. I didn't know Mr. Cree had been discharged or was going to be discharged until about two or three weeks after it happened. Didn't know anything about it.

Q. I want to show you Commission's Exhibit 7-A-B and ask you whether or not you received a copy of that letter, Mr. Hogan?

A. Yes, I have received—as a member of the Code Authority, I received a copy of that letter.

Q. Had you discussed any of the contents of the letter with Mr. Treanor prior to the time you received the copy?

A. Oh, no.

Q. Did you have any discussion with Mr. Treanor concerning this letter after you received the copy?

A. Yes, after I received it, I did. I will put it this way:
I was very critical of the letter, and Mr. Treanor
34574 had apparently been told of my criticism and came to see me about it, and we had quite a heated and spirited discussion over the letter; I maintaining that Mr. Treanor was writing about something he knew absolutely nothing about, as it applied outside the State of California, or southern California, where he operated.

Q. Had Mr. Treanor done business in the East?

A. No; I had been competing east of the Rocky Mountains since 1910, and never come in competition with Mr. Treanor in all that time, and I pointed that out to him, and I said, John, you don't know how cement is sold east of the Rocky Mountains, any more than I do about how it is sold in southern California, and I don't know absolutely anything about it there.

We had quite a heated discussion and he stated that based on his experience he knew enough about the situation to give his opinion; and then he asked for my opinion as to what he wrote in that letter, and I said that doesn't make you competent to write about the whole cement industry the way you have written, because you don't know.

Q. From your discussion with Mr. Treanor at that time, did it develop whether or not he had had experience in selling any other place than California?

A. No, he had not. He said he was operating in
34575 middle and southern California.

Q. We have had some other witnesses from your company, Mr. Hogan, who testified as to your practices of selling largely at delivered prices.

Let me ask you if you have ever given any consideration to the adoption of any other method of selling—I mean you, personally, as president of your company?

A. Well, as president and before that time, we have always sought to fix a way or find a way how cement could be sold on a basis or in some manner that would better satisfy ourselves, and I would say the trade, particularly the Government, people of that kind, and we have made quite a study in trying to find a way.

Q. What other method, Mr. Hogan, was considered, if any?

A. We have never found any method, unless it would be this f. o. b. mill selling. That is the only way that we ever found that would be alternate with the f. o. b. destination. There are only two points: f. o. b. mill or f. o. b. destination, and we have stuck to f. o. b. destination because the f. o. b. mill covered—the f. o. b. mill never seemed workable; and the trade wants to know what the cement is going to cost where they use it, and no place else.

In that way, we have adhered to it.

Q. Have you, in those studies or considerations
34576 you have mentioned, considered starting selling f. o. b. mill?

A. Well, we gave that some thought once in New Orleans, where we have a mill located, so that the nearest mill from ours has to absorb—the nearest competitor has to absorb considerable amount of freight to go in there.

We decided that the f. o. b. mill system would not work. We decided that we couldn't set an f. o. b. mill price at New Orleans that would keep our competitors out, but that no matter how unprofitable it was for them, they would continue to come in on the assumption that we would have to give up the f. o. b. mill selling sooner or later. Furthermore, we decided that if we set an f. o. b. mill price, we would thereby prevent ourselves from going outside the territory where we had a freight advantage to get business. In the light of these considerations we decided that we couldn't possibly work under an f. o. b. mill plan.

It can't be worked. An f. o. b. mill method of selling without something—without some law behind it or without something to make everybody do it, just can't be enforced. A man can't live under it.

Q. You are speaking now, as of your experience with your company?

A. Our survey and our study and the best conclusions we reached. Just couldn't be done.

34579 Q. Were they or were they not your reasons for following your present method of marketing?

A. They were our reasons, yes.

Q. Were they or were they not your reasons for not adopting an f. o. b. method of selling?

A. Our conclusions were based on our experience and reasons for not doing it—it was because, from our experience, we were sure it wouldn't work.

Mr. Liesure: I have some maps here I would like to have marked before I proceed further with examination on that subject.

34580 Q. Mr. Hogan, will you tell us what the outer limits are of the territory, at the present time, into which you ship from your Nazareth, Pennsylvania, mill?

34581 The witness identified Resp. Ex. 2460 as a map showing a demarcation for the territory of each mill except for Houston and Dallas in the pink area.

34582 Q. I think the record shows with respect to your company, and with respect to that map, that your territory goes to the Canadian border on the north, and to South Carolina on the south.

A. Florida on the south.

Q. And Pittsburgh?

A. That is for Nazareth mill.

Q. And into New York State and New England; is that correct?

A. Yes.

34583 Q. What does the green area show, if you know?

A. Are you referring to the whole map or just to Nazareth area?

Q. The whole map.

A. The legend is there on the map. The green area is that part of the territory adjacent to our mill in which we have as low or lower freight rates than anybody else.

The red marks are the Lone Star's cement mills which can be found at different places.

Trial Examiner Norwood: The black marks are competing mills; is that right?

The Witness: The black marks are competing mills; and all within green area, including south of Washington, everything within that line we have as low or lower freight rates as anybody else.

This territory here is where we have to absorb freight to get in—to meet these mills over there.

This is the whole state of Texas. Of this territory, we would have to absorb freight to ship into it.

In this Kansas territory, which we now serve—34584 where we have freight rates equal or lower—there are two mills there. Here there is only one mill in the territory.

Mr. Liesure:

Q. Mr. Hogan, in considering whether or not you would sell f. o. b. mill, did you use such a diagram, or did you not?

A. We did for New Orleans, yes. We used a diagram of that kind. We did use a map of this kind in figuring our New Orleans setup which I talked about a while ago.

On this map is a heavy black line.

Trial Examiner Norwood: Black dotted line, isn't it?

The Witness: Yes, a black dotted line outlining the trade area in which the Spocari mill is located, and which has as low a freight rate or lower than anybody else. They are in there by themselves.

That is why we considered New Orleans because it looked better than anything else.

By Mr. Leisure:

Q. You have been referring now, in explaining to the Examiner, to Exhibit 2460?

A. If that is this map, yes.

Q. Respondents' Exhibit for identification.

Trial Examiner Norwood: Yes, that is Respon-
34585 dents' Exhibit 2460 for identification.

By Mr. Leisure:

Q. Now, Mr. Hogan, will you tell us whether or not this map was prepared under your direct supervision for the purpose of explaining the reasons which you have already explained to us graphically as to the position of your mills with respect to f. o. b. mill selling, as compared with delivered price methods of selling?

A. It was prepared absolutely under my direction.

Q. And for that purpose?

A. Yes, for that purpose.

34588 (RESP. EX. 2460 was offered and received in evidence.)

34589 The witness identified Resp. Ex. 2459 as a map from the office of the City Engineer of the City of Dallas, Texas, showing the selection of Lone Star's cement mill to the center part of that city.

Our competitor's mill there is two miles further removed than we are from the center of the city, and that is what that is offered to show.

Q. Did you, or did you not, prepare that with reference to your reasons that you have stated as to your method of marketing cement by sales at destination rather than f. o. b.?

A. That map was prepared for the purpose of determining what our situation would be in Dallas, Texas, if we had to go to rigid f. o. b. mill selling.

That was the object in preparing it.

34590 (RESP. EX. 2459 was offered and received in evidence.)

34591 Q. I show you another map, Mr. Hogan, Respondents' Exhibit No. 2461.

Mr. Leisure: I wonder if we can get it where the Examiner can see it.

Trial Examiner Norwood: I can see it.

The Witness: You hold up one side, and I will hold up the other.

By Mr. Leisure:

Q. Will you just tell us under what circumstances you prepared this map, Mr. Hogan?

A. Well, for the purpose of determining what our position would be—

Q. I wanted to know under what circumstances it was prepared—under what circumstances you prepared that map?

A. For the same purpose, of showing what our position would be as to marketing our cement in the City of Houston, if we had to go to rigid f. o. b. method of selling.

The legend is marked there and it shows that our mill is about four and one half miles further from the center of the city of Houston than our competitor's mill is.

Q. And, as I understand it, you have considered those things with reference to your present method of marketing?

A. Absolutely, yes.

Mr. Leisure: I offer it in evidence.

34592 Q. Explain the map to the Examiner.

A. The circles marked indicate distances from towns, and the circle spreads out a mile for each circle from the center of town.

I believe the outside circle spreads about five miles, and we are half a mile or so beyond that, while our competitor is between one and two miles away from the center of the city.

There is another competitor located on the other side of the Bayou—the Gulf Cement plant.

You will notice the mark indicates that that mill is almost directly across from ours. You will notice the little No. 3. That is the Gulf Portland plant. That is a competitor that has come in, in the last couple of years.

Trial Examiner Norwood: What is your mill numbered?

The Witness: No. 1. Right down here. A little further left from where your finger is.

34593 The Trinity Mill is indicated in red with green around it.

Trial Examiner Norwood: The legend shows that?

The Witness: Yes.

Mr. MacIntyre: Mr. Hogan, I believe you stated the map in question shows mills that are nearer to the center of the city than yours?

The Witness: It shows all three mills located in the

City of Houston; the Trinity being about a mile and three quarters from the center of the city and ours and Gulf's five miles out.

Mr. MacIntyre: They are all within the switching limits?

The Witness: Yes.

Mr. MacIntyre: Any freight rates different?

The Witness: No.

Mr. MacIntyre: What advantage does one have over the other, then, with respect to reaching different locations within the city?

The Witness: None whatever at this time.

Mr. MacIntyre: How long has that prevailed?

The Witness: Oh, for a great number of years. I think about the first year after Trinity opened up there.

34594 Mr. MacIntyre: What do you consider the map shows?

The Witness: Well, it shows that—

Trial Examiner Norwood: Let's not go into the content.

Mr. MacIntyre: No, I am attempting to find out what the significance of the map is, as to whether or not it is material.

The Witness: On the regular f. o. b.—regular freight rate as it is now in selling, the way we do, we can match the Trinity or quote any place in the City of Houston, and they can match up. If, however, we went into the rigid f. o. b. plan, and Trinity wished to disregard the wishes of dealers and go to trucking, we would be at a decided disadvantage because it would cost us more to get into the city than it would cost them.

Mr. MacIntyre: But not by rail?

The Witness: Not by rail.

Mr. MacIntyre: It is only a matter of trucks and the buyers' trucks here could come and get it.

The Witness: No, they wouldn't have to do that; Trinity could get their own trucks.

Mr. MacIntyre: That would give the buyer an advantage, would it not?

The Witness: No, not necessarily. They could
34595 then get more for their cement in town than they do now. We wouldn't be in competition with them.

Trial Examiner Norwood: Do you testify you have verified these boundaries and positions?

The Witness: Yes, I do.

Trial Examiner Norwood: And so on, and you found them to be correct?

The Witness: Yes, that is correct, sir.

(RESP. EX. 2461 was offered and received in evidence.)

By Mr. Leisure:

Q. You may refer to the maps if necessary in explaining your answers.

I would like for you to tell us, first, the effect of quoting fixed f. o. b. mill price from Nazareth mill in Pennsylvania, if you will?

A. The Nazareth mill is located here. (Indicating.)—The little red dot in the middle of a pink circle.

34596 Mr. Leisure: The witness is referring to Exhibit No. 2460.

The Witness: Yes. And there are a great many other cement mills there. At the present time, they are marketing this cement from here to the Canadian border.

Trial Examiner Norwood: From down in Virginia?

The Witness: From North Carolina.

Trial Examiner Norwood: When you refer to the map—

The Witness: I understand, sir.

From North Carolina to the Canadian border and as far west as Pittsburgh.

34597 By Mr. Leisure:

Q. Will you just continue using Map 2460, Mr. Hogan.

A. Still on Nazareth, Pennsylvania?

Q. Explain the situation with regard to your Nazareth mill.

A. The Nazareth mill at present ships into a territory extending from North Carolina to the Canadian border and as far west as Pittsburgh. Under a system of f. o. b. mill selling, we would be restricted to this green area (indicating).

Our mill at Nazareth is located in an area where there are three mills within several miles and there isn't enough demand to support one mill for one day.

Trial Examiner Norwood: Tell us what you mean by f. o. b. mill selling in that answer.

The Witness: You want my answer. The Robinson-Patman Act makes us sell to all customers at the same price.

Mr. Wooden: No, it doesn't.

34598 The Witness: You are one attorney that doesn't agree.

Trial Examiner Norwood: He can tell us what he thinks.

The Witness: That is what we think. There are slight variations in that, but if we started f. o. b. mill selling to go into this territory here, for instance, where we now go in North Carolina, we would be selling our cement at a price we couldn't possibly afford to sell it for, if we had to sell it on that basis.

To go into this territory here, for instance, where we now go in North Carolina, we would be selling our cement at a price we couldn't possibly afford to sell it for if we had to sell it on that basis.

Trial Examiner Norwood: You said "rigid f. o. b. mill," didn't you?

Mr. Leisure: He didn't say "rigid."

Trial Examiner Norwood: Do you use f. o. b. or do you not?

The Witness: I mean one price at the mill to customers.

Trial Examiner Norwood: You mean a uniform mill net?

The Witness: No, not uniform mill net. A uniform mill price.

Trial Examiner Norwood: Well, that is a rigid f. o. b. mill, isn't it?

34599 The Witness: It can vary with quantities and things of that kind.

Trial Examiner Norwood: Yes.

The Witness: That would make it rigid.

Trial Examiner Norwood: It could not vary with destination or distance as I understand you.

The Witness: No.

Trial Examiner Norwood: You are not speaking of f. o. b. mill price that could vary with distance?

The Witness: No.

Trial Examiner Norwood: Or that could vary with competition?

The Witness: No.

Trial Examiner Norwood: Go ahead.

The Witness: I am talking about the way we understood it.

Trial Examiner Norwood: All right.

The Witness: That is the situation. With this method of selling we have been describing, the Lehigh Valley Mills, of which there are a great number, would be restricted to selling in here. (Indicating.)

Trial Examiner Norwood: Where is that?

The Witness: In this green area, including New York City and Long Island. The Hudson River Mills also sell in New York City, and by that competition there, they might and would be able to put their prices down
34600 so as to stop those mills from coming in there.

And then there are the Lehigh Valley Mills of which I have spoken. Under that kind of competition they would have a very hard time, and they would even be in a position then that it would be hard for them to survive because it so happens that most of these companies, with the exception of some that have mills on the Hudson River are single-mill companies and those mills in there would have a difficult time to survive.

Under that method, I think the competition would begin to reduce their price in trying to survive, trying to see who would survive.

But I think a situation like ours, is very important.

We have mills in several other territories, some of them more fortunately located, or favorably situated, and we have mills in foreign countries.

We have mills both in the United States and in foreign countries.

We could maintain a mill in the Lehigh Valley, but those single plant fellows would have to go out of business.

I notice from reading their reports that they have a hard time living, and they would have to go out of busi-
34601 ness. This territory here would be left—

Trial Examiner Norwood: What do you mean by "this territory"?

The Witness: Long Island, and this green area.

Trial Examiner Norwood: Yes.

The Witness: This green area (indicating) around the Lehigh Valley mills would be left to them under that condition. In there the Hudson River mills would also be competing on an even basis, at least, and if they wanted to take full advantage of the water freight rates, they could probably drive them out of New York City.

The Hudson River mills would also control that green area, which comprises Connecticut, Rhode Island, a big part of Massachusetts, part of Vermont, and part of New Hampshire.

34602 By Mr. Leisure:

Q. Mr. Hogan, in view of the objection that has just been made, I want to again ask you whether or not

the testimony you have just given is in connection with your own considerations as to your present method
34603 of marketing your cement?

A. The testimony I have given is the result of a study I have carefully made of the situation and based on our experience have established what we thought and what we know from the rate situation to be the lines of marketing for our territory.

Q. Mr. Hogan, one further question.

Will you tell us whether or not these are considerations which you have given and considered with respect to your present method of marketing?

A. Certainly.

34604 Q. Mr. Hogan, will you tell us what the effect would be on your present business in the New York City markets?

A. I think I outlined that in connection with Pennsylvania and New York.

Q. Did you cover that with respect to the Nazareth mills?

A. Yes.

Q. Was that all you wanted to tell us?

A. Hudson mills by equipping themselves could reduce the water rate in New York City and sell at so low a price that the Lehigh Valley mills couldn't sell their cement there.

34605 Q. Have you considered in the same manner heretofore the effect on Philadelphia?

If you have, will you please explain it to us.

A. The Philadelphia market, as that map outlines, would be closed to the Lehigh Valley mills because there is another cement mill very much closer in that would be able to cover the freight rate.

Trial Examiner Norwood: Your idea of this f. o. b. mill selling, about which you are testifying, is that the mill could not adjust its price so as to absorb freight. Couldn't it reach the same result by charging a lower mill price, and therefore, bring about freight equalization?

The Witness: Your Honor, I have always con-
34606 sidered that matter which you have suggested. That would be f. o. b. destination again.

Another way of approaching it.

Trial Examiner Norwood: If you were permitted to make such adjustments as would meet competition in that

way, then would it make any difference whether you sold f. o. b. mill or whether you sold destination price.

The Witness: That is exactly what we do now, make those adjustments.

Mr. Wooden: Depends on—

Trial Examiner Norwood: You have not answered the question.

Wouldn't or would there be any difference in the two systems?

The Witness: No, I think you would have exactly what you have now.

Mr. Wooden: You are right, of course. It is as plain as A, B, C, to me.

Trial Examiner Norwood: Go ahead.

By Mr. Leisure:

Q. Now, have you also given some consideration to the Norfolk mill and, if so, will you explain to us what that effect would be?

A. Well, I had better get over here and look at this.

34607 The Norfolk mill, as this territory indicates, sells down in this area, into South Carolina, all within this green area up along the coast of Delaware and the City of Washington.

Because of our favorable location as to freight rates, and being the only mill in that area, we would have a monopoly, so to speak, on the business on that basis.

Even in the City of Washington, we could control the City of Washington, absolutely on that basis, because we have water rates up here which we use and anybody selling in the city of Washington is meeting our price or going below them.

But ours is the price that makes price in the City of Washington. But all in that green area—all of it—would fall into the Norfolk Mill because of a low or lower freight rate than anybody else has.

Q. Now, as to the Birmingham mill, have you given similar consideration to that?

A. Yes.

Q. Would you explain?

A. Birmingham is something like the Lehigh Valley situation, five cement mills. They are pretty close together down there. Three large ones in Birmingham, one being in that edge of a kidney shaped territory.

The rest of them, or all three of them, would be on
34608 an even basis in this territory, which is north and east of that dotted black line that runs through there. Very small area. Doesn't have enough business to run one cement plant, let alone three.

If we attempt to go to the east, clear to the Atlantic coast, we run into the other cement mills, which, by f. o. b. price could keep us out, or keep anybody out.

Trial Examiner Norwood: What would be the local situation?

The Witness: In Birmingham?

Trial Examiner Norwood: Yes.

The Witness: There isn't enough business there to run one mill for one month. They are all big plants.

Trial Examiner Norwood: In moving out, they all have equal chance, do they?

The Witness: At the present time they all have an equal chance in this territory.

They would simply meet the other fellow's price.

Trial Examiner Norwood: Do they have an equal opportunity of selling, in your opinion?

The Witness: In this way?

Trial Examiner Norwood: Yes.

The Witness: Only in this limited green area, which is north of that dotted black line.

34609 That is the limited area left to them.

By Mr. Leisure:

Q. I didn't follow you there for a second, Mr. Hogan. Did you explain the justification for the five mills there? Under the present method of marketing?

A. Well, the five mills are there, because of the deposits of limestone which they found, and for—which they found was rather peculiar to the City of Birmingham, and they were put there with the idea of being close to the coal fields and fuel supply, things of that kind, so they could serve this territory.

Florida would be one of their markets that they could serve. Now, the Florida market, I think, most of them ship to the tip of Florida. We don't, because that business down in there is not attractive as to price, and we do not go down that far.

We abandoned that on account of competition and left it out.

The five mills, at the time they were built, seemed to have been a very good thing but—and they have a big territory this way to cover (indicating) under the present method of selling, and up in this area, they have a good market.

Q. You are indicating east and north?

A. Tennessee, north Alabama, and through Georgia and over into South Carolina, they have a good
34610 territory at the present time, and down into Florida they have a good territory.

Q. With respect to your Spocari Mill, have you, in the past, given similar consideration to that location? If so, will you explain it to the Examiner?

A. Yes. The Spocari Mill is located in the State of Alabama, southwest of Birmingham.

We have indicated by the black dotted line that cuts off the green territory, the territory in which Spocari has as low or as equal freight rates with anyone else, and that is indicated in that dotted black line, that whole territory in there.

34612 New York, New York.
Thursday, March 14, 1940.

34613 CHARLES L. HOGAN resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Leisure.

Q. Mr. Hogan, when we adjourned yesterday, we were discussing your reasons for your present method of marketing as adopted by you, and you were discussing the effect of a uniform price at the mills.

Will you, using your map, if necessary, explain to us whatever considerations you have given with respect to Spocari Mill on that subject?

34614 A. (Witness examines transcript.) Well, the only thing I could add to that—your question—is that all that territory within the black dotted lines running across the northern part of Mississippi, and about the middle of Alabama, including part of Florida, and, on this side, taking in the lower section of Mississippi, clear over to the Mississippi River is the territory in which Spocari would have as low or lower freight rates as any other mill in the territory.

Q. While you are near the map, and before leaving it, will you give us your reasons also with respect to your New Orleans mill?

A. Well, as indicated here on the map, according to that legend, New Orleans territory starts here with the lower part of Missippi, running across to the Missis-
34615 sippi River—the black dotted line which separates New Orleans territory from the Spocari territory—and it runs west there along the—about the middle of Louisiana, to the western side of Louisiana, where there is another black dotted line showing the division between Louisiana territory and Texas territory.

Again, in that territory, our New Orleans mill is the only mill there, and we have as low or better freight rates than anybody else in that territory.

Q. Before leaving the map, will you next take up your Dallas territory, please?

A. The Dallas mill is located, as indicated by the red and black mark, there being two cement mills there. And the green area, running down to the black dotted line, about half way through the state, shows the part of the State of Texas that would remain to those two mills, the two of them having as low or lower freight rates than anybody else within that green area described.

Q. I am not clear. Would your company be in a position to keep the Trinity mill from selling in the City of Dallas, or would you both have an equal opportunity?

A. No. In the city of Dallas, we are two miles closer than Trinity. On a freight rate basis, they are equal; if it came to a trucking rate, we would have the advantage.

Q. Would you be good enough to refer to the Houston mill next?

34616 A. The Houston mill. The green area starting with this dotted line, I described, separating Louisiana from Texas and western part of Louisiana, following that line up to the—just west of the Louisiana-Texas line to where the dotted line separating the Dallas and Houston territories is shown, and continuing west along back of this green area, outlines the territory in which the three Houston mills would have as low or lower freight rates than any other mill.

Q. Now, with reference to this Respondents' Exhibit 2461, which is the territory around Houston—

A. Yes.

Q. —will you explain that to the Examiner as you have on the map, 2460?

A. This map is an engineer's map of the City of Houston, with circles drawing—showing distances from the center of the city, each circle representing a distance of one mile.

The green part showing down here—mark No. 1 in the lower right side of the map, is the location of our cement mill. And by comparison with those circles, it shows it is about four and three quarter miles, or five and three quarter miles from the center of the city.

The map shows Mill No. 2 in the area between the one and two mile circles, is the location of the Trinity Cement mill and it is about four miles—four and a half miles closer to the center of the city than what our Houston
34617 mill is. There is another line marked No. 3 on the right hand side, almost down half way from our mill, which is the Gulf Portland, and it is a little further away from the City of Houston than we are.

Q. You mentioned Trinity Mill. Is Trinity Mill so much nearer Houston that its freight advantage would preclude you from shipping into that market?

A. The condition now present in there, as in Dallas, the railroad freight rates are the same. But if we were selling on an f. o. b. mill basis, and the Trinity Mill elected to truck, we would be at a decided disadvantage; in fact, at such a disadvantage that I have considered that we would be practically shut out of the City of Houston.

Q. Have you had any experiences with situations comparable to that anywhere?

A. You mean differences in trucking?

Q. Yes.

A. We have a situation in the City of Washington that shows the disadvantage of a location where trucking is used. Our silos are about three-eighths of a mile further from the city than the silos of competitors. But, despite that short distance—small distance—we have found it impossible to market our cement in the City of Washington direct from those silos.

We had to adopt a practice of loading the cement
34618 into cars and having them switched up and have the cement put in the silos in the center of the other group.

Q. Coming back to Houston again, what would be the

general effect on the market then which you now serve from your Houston mill?

A. How do you mean that? As to whether we could do business there?

Q. Yes.

A. In my judgment, the Trinity Mill could absolutely shut us out of the city of Houston. They have four and a half or four and three quarters miles advantage in trucking. As I said of Washington, three-eighths of a mile makes all the difference in the world in delivering cement through a congested city.

Q. Do you, at the present time, or do you not sell along the Rio Grande in Texas?

A. Yes. As this pink area indicates, that is part of our territory.

Q. That is map, Exhibit No. 2460, you refer to?

A. Yes. We sell clear down to the Rio Grande River. There is only a little area in Texas in which we don't travel any men. Don't attempt to sell.

Q. Would you continue to sell under the uniform mill price?

A. I do not see how we could if the mills at San Antonio would have so much lower freight rates.

34619 Q. Will you refer to the Bonner Springs Mill, and tell us the effect there?

A. The Bonner Springs mill is located on this map by a red mark, just west of the town of Kansas City. There is also a mill just east of Kansas City. In fact, those mills happen to be almost the same distance from Kansas City.

The green area, which is outlined takes in a part of Kansas, the tip of lower Nebraska, a small part of Iowa, and part of Missouri, and is the area in which those two mills would have as low or lower freight rates than anybody else.

Trial Examiner Norwood: Inside of that area, would there be enough consumption to support a mill?

The Witness: I think, in that particular case, there, your Honor, there would be enough to support the two mills because it takes in the two Kansas cities, and the two cities in that district are really the heart of the cement business.

By Mr. Leisure:

Q. That would be the effect of inaugurating a flat mill price at your Bonner Springs mill?

A. Yes.

Trial Examiner Norwood: The other mills can serve the west portion—they can serve to the west of that green area?

The Witness: Yes. You have the mills from the 34620 gas belt that serves this territory.

And here is a mill in Nebraska. Their line of freight rates cuts us off there. Here is a mill in Nebraska just south of Omaha, that comes down.

By Mr. Leisure:

Q. Have you considered the effect of a flat mill price at your Limedale mill in Indiana?

A. Yes.

Q. Explain that to us.

A. That is indicated on the map by the green area that takes in part of the middle of Illinois, and a big part of the State of Indiana.

In all the area within the green lines, the Limedale mill would have as low or lower freight rates. There is no other mill in that area, and Limedale would have that territory exclusively.

Q. What, if any, would your Limedale be excluded from?

A. Be eliminated from all the pink area surrounding.

Q. Does your Limedale mill ship into Chicago?

A. We make a few shipments, but not a great many. Not a great big factor there.

Q. I would like to know your answer to the Examiner's question on the preceding mill,—I would like to have your same answer on this one.

Would there be enough consumption available in 34621 your Limedale mill to continue to operate under flat mill price?

A. Yes, the study I have made would indicate we have enough business there to keep that mill going on reasonably good production in that area.

Q. Do you mean at Spocari, and New Orleans, and Limedale, and Norfolk, you have a large exclusive territory which has, I take it, adequate available consumption?

A. That is correct.

Q. That would apply to a uniform mill price?

A. Yes, that is correct.

Trial Examiner Norwood: You told us about some mills that do not have a sufficient consumption.

The Witness: That is, the mills at Nazareth and here at Birmingham, you have that same situation.

Trial Examiner Norwood: Those are the mills where that condition exists?

The Witness: Birmingham and Nazareth, and, to some extent, New York also. And the Dallas Mill—the Dallas mill is not near enough—there is not near enough business in that territory to support it. And, in Houston, we are put at a decided disadvantage. We are shut out of the city. You get out two miles and the freight rates are equal. Get two miles out and we are on an equal basis in that territory.

By Mr. Leisure:

34622 Q. That is the situation at Houston.

How about Dallas and Bonner Springs?

A. Bonner Springs, the rates equalize there, and I think trucking equalizes. The freight rates are equalized because the mills are about the same distance from Kansas City. The rates equalize. Those two mills have a good territory there because they have a good consuming market.

Q. You are speaking of—

A. Bonner Springs. The territory in which Bonner Springs is located. Those two mills would have a good territory, I think.

Q. And, as to Dallas?

A. As to Dallas, Dallas would be crippled badly because there are two cement mills there—that is, in the green area—that wouldn't provide enough business, I don't think, to keep one of them running satisfactorily.

Q. And, as I understand it—what is your understanding as to Birmingham and Nazareth, just summing up your testimony?

A. The area there left to the mills located in that green area where they had equal freight rates, the consumption is so small both at Birmingham and at Nazareth, there simply wouldn't be enough business to keep—well, in the Birmingham district, I don't think there would be enough business to keep one mill running very well. There are three there.

34623 In Nazareth, it would keep about four or five out of twenty mills running.

Q. Have you considered, and if you have, will you tell

us what your considerations were as to how, if at all, such change would affect your price?

The Witness: Well, I think in the areas like
34624 Lehigh Valley, the first result would be lower prices and that would continue until some of the cement companies would stop operating or go out of business. The same would be true at Birmingham and at Dallas, At, Norfolk, Spocari, and New Orleans, and Limedale, I think the first reaction would be that those companies outside would try to make base prices that would let them come into those green areas. But inasmuch as we have very efficient mills in that territory, we would naturally match their prices and keep them at the edge of those green areas.

I think the same would be true at Bonner Springs. As for the Hudson mills—that green area (indicating) shows there are three or four mills up there that participate in that area as well as in the City of New York. Now, that would be a bad place for us, because until we found some way of getting our cement to the Hudson River different from what we have now, the method we use now in which we have to absorb eight cents a barrel freight rate, together with the cost of hiring men to load out of the warehouse, we would be at a disadvantage and we would then have only left to us Connecticut, Massachusetts, and parts of New Hampshire and Vermont, in which we might try to sell.

We would be at a disadvantage.

34625 In Washington, we would have lowest price of anybody there.

By Mr. Leisure:

Q. Now, so far we have been considering it, Mr. Hogan, as though you were the only cement manufacturer—or manufacturing company in the country.

Have you considered what the effect would be if your mill should suddenly adopt the method of selling at a flat price at the mills and your competitors did not?

If you have, will you tell us what those considerations have been?

A. You mean, we do it voluntarily?

Q. Yes.

A. We could not live under such conditions. We would have to lower our prices to such an extent, even where we have the lowest freight rates—we would have to lower

our prices to such an extent that we would be losing money even on our most favorable business.

We don't believe we could ordinarily carry on that way. We couldn't go out and compete. Our tonnage would not increase greatly. And the other fellow could come into our territory as far as he wished to bring his methods of selling, and meet whatever price we made and share in the business.

Our price would be down, and our tonnage would
34626 and our volume of business would be down, and, consequently, we would lose on both sides. We would be losing by lower prices which we would have to make and by higher costs.

Q. Now, I am not clear from your last answer, Mr. Hogan, when you said your tonnage would not be increased much, did you refer to the tonnage in the green area?

A. Yes, surely.

Q. Or the total tonnage?

A. If we go on an f. o. b. mill voluntarily—if we go on an f. o. b. mill method of quoting, voluntarily, and we stick to that uniform f. o. b. mill method of quoting our tonnage would be affected because we couldn't go out and get the business as we do.

The other fellow would come into our territory, as they are now, because they wouldn't be under any restriction. And, experience has shown they continue to come into an area long after there is a profit to them because they think that conditions will change and the thing will be more profitable and they want to stay in the territory.

34627 Experience shows that if the prices are low, that continued.

Q. In considering whether or not you might adopt a flat price at your mills, have you considered whether or not your competitors would follow suit?

In other words, if you followed suit, what is your attitude towards following the action of your competitors if they should adopt such a method?

A. From the study I have made and the experience we have had, I would say we would not follow suit.

Q. Would you or would you not have any assurance your competitor would, if you adopted such a method?

A. None whatever. I would say no.

Q. You mean, no, that they would, or no, you have no assurance?

A. We have no assurance that they would follow suit.

Q. In drawing these maps, Mr. Hogan, and in considering this problem, did you give any consideration to the possibility of readjustment of present railroad rates?

A. No. We worked those maps on existing freight rates. We didn't speculate on what adjustments might take place.

Q. Did you give any consideration to the establishment of silos at other points than at the mill, when you fixed the mill price at such distributing points?

A. We didn't give that consideration. We did 34628 not give consideration to that. I took the picture as I found it and the experience we had with it, and worked it out on that basis. Those are developments we would have to meet when they come.

Q. I suppose that applies to the establishment of warehouses?

A. Yes, same as silos.

Q. Just let me ask him this. Have you had any 34629 railroad experience?

A. Yes, for about fifteen years.

Q. Based on your own experience, what has been your experience with respect to adjustments of rates in that way?

A. Well, in my—in the early days, say, 1910 to 1915, there was quite a bit of agitation by various mills located in different parts of the country to get favorable freight rates.

Quite a bit of agitation carried on and a great many hearings, and one thing and another held on it; that finally resulted in the Interstate Commerce Commission putting in a mileage scale of freight rates.

It is not the—it is not on the same basis in every part of the country. There is a certain mileage scale for different parts of the country. It varies above or below, as the case might be. But practically all of the United States east of the Rocky Mountains today, operates on that mileage scale that the Interstate Commerce Commission put in.

Trial Examiner Norwood: Well, tell us how this would be affected if the railroad—I mean, tell us whether or not, in your experience, it would be possible for the rail-

roads to make adjustments that would enable you to sell on a flat price?

The Witness: Well, any adjustment that the rail-
34630 road would make would have to be made to favor some particular mill on their line in order to get into some particular territory.

Now, in my experience in railroad work, and in the cement business, too, whenever one railroad does that, another matches it so that they keep the thing on a parity. That is the way that works out.

By Mr. Leisure:

Q. Then will you tell us whether or not, in the experience that you have had, Mr. Hogan, or the railroad adjustments that you have observed thus far in your experience—whether or not those adjustments did affect different situations seriously one way or the other.

A. The adjustment that the Interstate Commerce Commission finally made was a pattern or a basis for all cement rates practically, and if they followed that pattern—continued to follow that pattern, I do not see that the adjustment would make any difference. It might reduce freight rates, might reduce the possibility of trucking, but I think freight rates would be kept on a parity.

34631 Q. Mr. Hogan, you mentioned—rather, I asked you a moment ago about warehouses and silos.

In establishing the warehouses, do you or do you not have expenses similar to those of dealers when you establish the warehouse?

A. Yes, and you have the expense of transportation. The only warehouse we ever maintained in the United States is the one at Washington—we did try others—and we do that because we have such a big saving in freight rates by water as compared with rail, so that we can maintain this method and more than offset the expense at destination.

Q. Do I understand, by your last answer, you have or have not found your operation in Washington to be successful?

A. Well, it has not been as nearly successful as we hoped.

Trial Examiner Norwood: That is, in Washington?

The Witness: Washington.

Trial Examiner Norwood: District of Columbia?

The Witness: District of Columbia.

By Mr. Leisure:

Q. I intended to ask you earlier, Mr. Hogan, when I first started asking you about these maps, whether or not you considered establishing separate grinding plants
34632 at these various shipping points in conjunction with your—

A. No, we have not considered that. We feel it is impractical, as a general proposition.

Q. I would like for the Examiner to know just why you consider it impractical?

A. Well, it is in a measure the same as establishing a warehouse or silo. All you do is add to the cost of manufacturing. You are adding to the cost of manufacturing and distribution, and making it cost more to the consumer, in the long run.

When you separate an operating proposition like manufacturing cement, which is done on a volume basis, to be economical, and put part of it off on another—in another city where you have to hire separate employees, superintendents, workmen, and so on, I think it is not wise, to say the least.

We did, at one time, study it with the object of trying to put a grinding plant in the City of New York. Mr. Struckman went into that quite extensively and then gave it up as impractical.

I worked with him on that problem.

Q. Passing to a new subject matter, Mr. Hogan, in your experience, have you found that much cement was sold at special prices, or have you not?

A. Oh, yes, there is always cement being sold at
34633 special prices. You mean by that, at prices below the advertised commercial prices?

Q. You give us your understanding of what the word "special" price means. It has been used in the record a good deal.

A. My understanding would be any price below the advertised or the specifically quoted price of the cement manufacturer; that is, the openly quoted price.

Any time he sold below that, or gave terms or conditions that resulted in a customer getting lower cost to him, I would call it a special price.

34635 Q. Mr. Hogan, will you explain how, if at all, you obtain knowledge of special prices?

34638 The Witness: The answer is the same—we

obtain knowledge from information we gather in the
34639 field and by testing the market. In other words, we have a suspicion that condition exists, so by offering cement at lower price, by trying to find out what is going on, and by those methods, we are placed in a position to meet the competition.

Another way is by studying the bids submitted on various public lettings.

Now, you will find that can be supported by facts. I do not have them with me, but there are any number of public lettings going on all the time, and there are prices varying on them. And those facts are a matter of public record.

The City of New York here is an example. One company has sold practically all the W. P. A. cement that has been bought in the City of New York since they started the W. P. A. One company through one dealer. Prices quoted on that for delivery to the job have been infinitesimally small above the price to the dealer, or in some cases, have just been equal to the price we quoted for dealers.

Trial Examiner Norwood: Can you specify those occasions for that?

The Witness: Every W. P. A. letting in the City of New York since the W. P. A. started, is in that class.

34640 By Mr. Leisure:

Q. Will you go ahead with your answer, Mr. Hogan?

34641 The Witness: The same condition obtains in all such propositions in the City of Omaha; it is the same in Little Rock, Arkansas, and in one other place I can't remember. But in those three places, it has been a flagrant thing.

In Omaha, there have been instances where they quoted as much as five cents below the published quotation to dealers. The dealer, in turn, has quoted five cents below that to the W. P. A.

Trial Examiner Norwood: Well, that is, the manufacturers quoted five cents below the dealers?

The Witness: No. I want to get that straight, your Honor.

Trial Examiner Norwood: Yes.

The Witness: Our price and the published quoted price on all cement manufacturers' sales to the dealers—

Trial Examiner Norwood: Yes.

The Witness: Were five cents above the amount the dealer offered to the W. P. A. The same thing obtained in Little Rock, Arkansas, at the central mixing plant.

Trial Examiner Norwood: What time was that?

The Witness: At the same time the W. P. A. started.

34642 Trial Examiner Norwood: 1933?

The Witness: I imagine it was. I don't know when that came in.

34644 By Mr. Leisure:

Q. Mr. Hogan, you have said, in answer to the Examiner's question, you inferred special prices by the cement companies. Give him your reasons.

A. May I interrupt a minute? I had not finished my cases I wanted to give you on that other question.

Q. Oh, I beg your pardon. I thought you were finished.

A. On the Colorado River Dam lettings, of which there were four, I think, in Texas, every one of those jobs was quoted at a price below the quoted commercial price.

Every one of them. I am giving you now public
34645 records. Every one of them have been on lower than published prices.

34647 Q. Mr. Hogan, in quoting your own price with all these companies yourself, do you base your prices in any way on the inferences which you draw from the quotations you see in the field, and the sales to dealers, including special prices?

A. When our special prices are quoted, we frequently ignore them for a period of time until business is taken away from us, and until we have to meet such competition. Where there are lower quoted prices, openly quoted, we may meet those prices. I mean, what we call a published—openly published price.

We may meet those prices; but special prices we ignore until the amount of business we are losing becomes so great,—

Q. Do you then take cognizance of those special prices or not?

A. Yes, we do, because we have to meet that competition.

Q. How do you find out then about the existence of your special prices, or of those special prices which
34648 you do take cognizance of?

A. By the manner I described before, by testing

the market and reports we gather from field men or anybody, dealers, who have had prices quoted to them.

Q. In basing prices, if you have had to meet your competitors' prices, on what do you—what are your reasons for inferring those special prices?

A. The fact we learn they have been quoted and the cement has been sold on them, and they are not a published quoted price.

34649 Q. Mr. Hogan, so there cannot be any question about it, any question of confusion raised by Mr. Wooden, or by anybody else, explain to the Examiner what it is that causes you to feel there are special prices in New York, for instance. Take New York first.

The Witness: In all of the cases I have had—

34650 I had a case in New York, one in Nebraska, Little Rock, Arkansas—in all of those cases we have, by studying the public bids, determined that the dealers have quoted in most cases as low, and in some cases somewhat lower, and in a very few cases a little higher than prices—the advertised published commercial price to the dealer.

The dealer, in turn, had quoted below that. In some cases, as much as ten cents a barrel below it. If it is an inference, maybe I don't know just what to do about it, but you don't get the business. You have to decide that.

By Mr. Leisure:

Q. You do act on that situation as far as selling your own cement?

A. No. In a very great many of those special cases; for instance, in the City of New York, we have never attempted to meet that competition. We haven't in Omaha.

Q. Your action in that case is not to try to meet it; is that right?

A. Not try to meet it.

Q. Do you or do you not quote prices to meet the competition of your competitors?

A. There—their published quotations, yes.

Q. That is, to meet the market prices?

34651 A. Yes, published quotations.

Q. Have there been any occasions when Lone Star did not follow that general policy?

A. Yes, there have been occasions when we didn't follow it.

Q. Tell us when, please.

A. Through the years 1931 and mostly 1932—most of

1932, if not all of it. We got away from our fixed policy of one price only.

Q. Why, Mr. Hogan?

A. Because the competition was selling at special prices all over the country. Our business was falling off, and we were losing our business very rapidly.

Q. What, then, if anything, did you do to meet it?

A. Well, our company took that very seriously. We had been on a one-price policy for years; but after a great deal of discussion it was—finally it went clear to the Board of Directors and they authorized us to meet that competition. Not only meet it, but go out and get business. We not only went out to get business, but we went out to go below, if necessary.

That extended through 1931 and into 1932, but by the middle of 1932, the price had gotten so low there wasn't anything left to cut.

34656 Q. Mr. Hogan, in your last answer, you used the term "one price policy."

Will you explain what you mean by the use of that term, and whether or not your company does or does not use it?

A. Used it as long as I have been in business. Every business I have been in. Means a company selling at the price advertised. Not any deviation from it. Every department store in New York uses it.

Trial Examiner Norwood: Selling according to your announced—

The Witness: Announced price.

Trial Examiner Norwood: And not selling below it?

The Witness: Yes.

By Mr. Leisure:

34657 Q. During this period, there—and there has been so much interruption I am not sure whether you finished clearing up that situation.

A. No, I hadn't. That was the major exception we had at that time. We also departed from a one-price policy in the State of Mississippi, starting in 1937. We matched a condition which we found down there, where prices didn't seem—any fixed price or established price didn't seem to exist.

There were no prices. Later in Indiana, we did the same thing for a short period of time. I believe that was about

the only times we ever deviated from our one price policy. May have been one or two others, but I don't recall it.

34658 Q. Did Lone Star send out written quotations during this period?

A. In 1931 and 1932, we made our special prices to contractors until some of our competitors quoted prices that were equal or lower than what we were quoting to the general trade.

We then met that condition by sending out quotations. But we have never made a practice of sending out written quotations.

Q. Mr. Hogan, on this subject of price cutting—and I want you to base your answer on your factual experience if you have had such, and if you have not, say that you have not—do you, or do you not find that secret prices are given to contractors more or less frequently than to dealers?

A. They are given to contractors much more frequently.

34659 Q. And, can you explain the circumstances as to that?

A. Well, the dealer trade is scattered throughout the United States, almost in every little hamlet or village there is a dealer and the total amount of cement which individual dealers buy with the exception of a few in the larger cities is not—I mean the total amount for a year is not great enough to warrant any one going in and making them secret prices.

There is another point entering into that, and that is if the dealer took on just one brand of cement and, at a reduced price, stocked that cement, he might easily find his trade was demanding other cement and he would not be able to reap the benefit he would if he could handle on that quantity.

Such big cities like New York, Boston, Chicago, we have from our experience been led to believe that certain dealers have been given special prices. We have never made any special prices to dealers. Never done that. Made special prices to contractors, because in that case the contractor has a job, he is the only buyer on the job, and he may not have another job for a long time and you are making him that special price for just that one job; whereas, if you gave it to a dealer, it would be a continual operation, throughout the year. We don't do it.

Trial Examiner Norwood: Do not dealers find out
eventually you have sold to a contractor under the
34660 published price?

The Witness: They—when they do find out, your Honor, they naturally ask for such prices, but they are not given to them by our company, and from my experience, it is not a general practice to give it to them except in these big centers and a few others.

Trial Examiner Norwood: Wouldn't that lose you the customer?

The Witness: No, not always. The point I made in my answer, your Honor, comes in there. A dealer stocks cement and has got a trade established for your brand, and he is not always willing to throw that over just because he doesn't get what he wants.

He sometimes sticks with us and gives us some business.

Trial Examiner Norwood: He is more interested in his competitor not underselling him, anyway.

The Witness: That is exactly the point.

Trial Examiner Norwood: If you do not make a cut to his competitor, he is not so hard to handle?

The Witness: If he is on the same basis as his competitor as to price, he is not hard to handle.

By Mr. Leisure:

Q. What has been your experience on the advantages
of price cutting—advantages or disadvantages of
34661 price cutting, special prices, I mean?

A. There are practically no advantages. You can, for a time, increase your tonnage at a reduced price, but that practice begins to spread and you have prices so low nobody can make any money.

I don't think we ever reduced prices over a period of time that it didn't cost us money.

The witness identified Resp. Ex. 2462-A, B and C as a compilation of shipments by the various domestic divisions of the Lone Star Cement Company for the years 1935, 1936, 1937 and 1938, divided as to destination in the pink and green areas as shown on the map [Resp. Ex. 2460]. The map was prepared under his instructions by the men who handle this work. Records of this kind are kept in the sales department but not compiled in the condensed form these are. But they are kept in the sales department in the regular course of every day business. We had them put in these figures and condensed in that

form and it resulted in this report. It is a condensing of the various figures as shown in the every day report." These records are kept as a matter of routine by the employees regularly charged with this duty and he can vouch for their accuracy.

34663 (RESP. EX. 2462-A, 2462-B, and 2462-C was offered and received in evidence.)

By Mr. Leisure:

Q. One other question, Mr. Hogan. In your experience since the Institute was formed, has it ever influenced or attempted to influence your marketing policies in any way?

A. No.

Q. Has it ever interpreted or attempted to interpret any of your policies in any way?

A. No, it hasn't.

Q. Has your company, to your knowledge, or have you ever had any agreement or understanding with any of your competitors to the effect that certain mills should or should not be recognized as basing points, and other mills should be regarded as non-basing points?

A. Absolutely not. All of our mills are basing points.

Q. Have you ever had any agreement or understanding with your competitors as to prices that you would quote?

A. No.

Q. In the future. Or as to your method of computing prices?

A. No.

34664 Q. Or as to your manner of making quotations?

A. No.

Q. Or as to any bids you have made on public—

A. No.

Q. —lettings, either State or Federal?

A. None.

Q. Or any other Government agency?

A. No.

Q. Or as to what mills—I think I asked you as to what mills should or should not be considered as base or non-base?

A. You did ask me that.

Q. Have you had any agreement or understanding?

A. Oh, no.

34665 It Is Hereby Stipulated, that if Charles L. Hogan, President of Lone Star Cement Corporation, were to testify on his direct examination with respect to the

topics hereinafter indicated, he would give as his testimony with respect to those topics the statements hereinafter set forth:

34667 Organization of Lone Star Cement Corporation, Formerly Known as International Cement Corporation.

The International Cement Corporation was incorporated under the laws of the State of Maine in 1919. The name of the corporation was changed to Lone Star Cement Corporation in 1936 and its subsidiary companies in the United States were merged in the single corporation since known as Lone Star Cement Corporation. The corporation's principal office was and still is in New York City. The company now has branch offices in eight states, including New York, Virginia, Alabama, Louisiana, Texas, Kansas, Indiana and Pennsylvania. There are two offices in New York State, one is in Albany and the other is in New York City.

The corporation has ten cement plants operating under eight district offices. All of these plants are in operating condition, although all of them have not been operated continuously.

Eight of the plants were acquired by purchase. One plant at New Orleans was a plant built by the corporation on a new location where no plant had previously existed. One plant in South Norfolk, Virginia was built as a new plant, but there had been a cement plant in that location which was completely rebuilt by the corporation. Of the other eight plants the one at Bonner Springs,
34668 Kansas was rebuilt some time after it had been acquired. The corporation has a silo which it operates in the District of Columbia.

The International Cement Corporation above referred to has never had any connection with the International, Ltd., a corporation located in the State of Washington and conducting a cement business there.

The Lone Star Cement Corporation, which we will refer to hereafter as "Lone Star" is not affiliated with any other cement manufacturing company except its foreign subsidiaries. No officers of Lone Star are officers of any other cement company. Lone Star has approximately 11,500 stockholders. No cement company owns any substantial

amount of Lone Star stock. The stock of Lone Star is listed and traded in on the New York Stock Exchange.

Types of Cement Manufactured by Lone Star.

Lone Star manufactures Standard Portland cement, which is sold under the brand name "Lone Star"; High-early-strength cement, sold under the brand name "Incor"; and a special strength cement for deep oil well construction, sold under the brand name "Starcor."

There has been a growing demand for special specifications of cement in recent years. This has been due
34669 to the activities of State Highway Commissions, changes in Federal Government specifications, and the activities of special consulting engineers engaged to supervise construction work. Cements manufactured to meet special specifications ordinarily are sold for the same price as Standard Portland cement. The only cements which Lone Star sells at a different price are "Incor" and "Starcor."

Although Lone Star cement exceeds the minimum specifications for Standard Portland cement, the corporation has never been able to obtain a premium in the sale of its Standard Portland cement.

Experience of Mr. Hogan With Trucking.

The only direct experience I have had with trucking was during the time from 1924 to 1927, while I was manager of the Knickerbocker Portland Cement, a subsidiary of International Cement Corporation, with a plant at Hudson, New York.

Loading trucks at our mill involved a great many mechanical difficulties, interrupted the car loading schedule, and also caused considerable friction between ourselves and our customers because of inability to serve trucks promptly and in the manner desired. Furthermore, serving trucks at the mill involved a considerable
34670 additional cost as compared to loading in cars.

The principal difficulty, however, arose with dealers. A dealer would come with a truck for cement, presumably for his own yard. Many times we afterward found he had taken the cement to another town and sold it

there at a lower price than our dealer who was established in that town. This disrupted our dealer trade; dealers having established places of business with the attendant overhead expense, cannot hope to compete with those who, without such expense, invade their markets.

After I left Knickerbocker to become Executive Vice President of Lone Star, I found that this difficulty with our dealer trade caused by trucking, was common to all our mills where trucking was permitted; and as trucking increased over the years the friction with our dealers increased correspondingly, so that by around 1930 and 1931 I was convinced that trucking was not a desirable method of serving our customers.

Our whole method of distributing through dealers is based on the fact that they have equipment and carry a stock of cement in their warehouse at all times so the customers can be properly served. When they buy by carload, you know that they will carry such a stock; but those who truck try to get by without stocking
34671 cement in the warehouse at all, and only come for a truckload when they have an order. This retarded the sale of Lone Star cement because frequently the dealer would have little or none of our cement in his warehouse. Then a customer might buy cement from another dealer or buy another competitor's cement from this same dealer, or he might use some other material instead of cement.

There is an enormous amount of cement bought by people who want only a few sacks or barrels. It runs up to a large total annually,—perhaps six or eight million barrels a year. You never can trace it or tell where it goes. The dealer himself could not tell you. We want to be in on this class of business, and unless the dealer takes it by the carload and keeps a stock of our cement on hand, we are likely to lose this business.

None of the policies or practices of Lone Star with respect to trucking was the subject of or the result of any agreement or understanding with competitors or dealers or dealer associations. The discontinuance of trucking by Lone Star and its various mills was not the subject of or the result of any agreement or understanding with competitors or dealers or dealer associations.

34672 Purchase by Lone Star of the Nazareth, Pennsylvania, and Spocari, Alabama, Plants.

Lone Star purchased in the Spring of 1928 the mill and property of the Phoenix Portland Cement Company at Nazareth, Pennsylvania. Lone Star had for a long time felt the need for a mill in the Lehigh Valley to supplement its Hudson mill in the northeastern territory. The latter could not serve much of the territory served from Nazareth, nor could it produce a light colored cement desired by a large part of our trade.

The plant at Nazareth had been prosperous. It was in good condition. The business outlook in 1928 made the purchase of the plant look like a good proposition. In 1928 Lone Star operated the Nazareth mill with a bigger production than it ever has had since. 1928 was the year of the largest demand for cement. The competition of the Nazareth mill before the purchase was not affecting the Hudson plant any more than any other of the Lehigh Valley Mills.

Lone Star purchased its mill at Spocari in May, 1928. When it bought the Spocari mill, its nearest mills were at Birmingham, Alabama, and New Orleans, Louisiana. These mills were in competition with the Spocari mill.

34673 The Spocari mill is located on a navigable river so that it can ship cement to the coast by water.

Furthermore, it has a very soft limestone from which the cement is ground. Lone Star believed that it was possible to develop that mill into a very low cost property; and by reason of the water transportation that it could meet competition in the South which would be otherwise difficult to reach. The quarry is unique in that it is the only one in the country or is one of the few quarries where no blasting, drilling, or electric shovel work is necessary. The limestone is a soft chalk-like material, located very near the surface, so that it may be quarried by means of a cutter which slices the limestone off the quarry face, much like a sharp knife cutting through cheese.

Lone Star had just developed its high-early strength cement, Incor, and the composition of the material used at Spocari seemed especially adapted to making of Incor cement. At that time all of the Incor was being manufactured at Limedale, Indiana. After Lone Star bought the Spocari plant, it manufactured Incor there exclusively

for a period of a year or two, but when the demand for cement fell off in 1930 and 1931, it closed down the mill and didn't attempt to operate it until it was reopened again in 1938.

34674 Although Spocari reaches territory that Lone Star was already reaching from other plants, it has the lowest freight rates from the mill to a great part of the territory reached by its Birmingham and New Orleans mills.

Prior to the time that Lone Star purchased it, Spocari had been a non-base mill. At one time Spocari undersold Lone Star so persistently by quoting special prices that Lone Star finally quoted its whole territory on the basis of these special prices. This was in the latter part of 1927. The Spocari mill was never an important factor in the cement business. Its method of selling was not what led Lone Star to purchase the plant. The principal reasons were, as stated above, its desirable location and the advantages it enjoyed in natural resources. Lone Star expected the cement business to continue prosperous, and planned to put the mill in good condition, and, within a year or two, to have a very profitable investment.

Experience of Mr. Hogan with Freight Rate Books Prior to the Institute Freight Rate Books.

Before I became connected with any cement company, I was employed by a railroad in its traffic depart-
34675 ment. In this work, I became thoroughly familiar with tariffs and freight rates and the computation of rates on particular commodities, such as cement.

When I was in the railroad business, they did not have a conversion table of the kind used in the cement business, but one very similar. I personally made up conversion tables for different commodities.

When I went with the Lumbermen's Cement Company in 1910 as traffic manager, one of my jobs was to prepare freight rate books for that Company. At that time there were no freight rate books issued for that territory which could be purchased. The way I prepared such book was as follows: I purchased from a stationery store in Kansas City sheets of paper which were ruled so they were suitable for compiling freight rate information. Down the left-hand margin were spaces for eight or ten towns to be

typed in, and the sheet was ruled in columns with headings so the various cement-producing points could be listed. Each freight rate book was compiled by typing in on the left the names of all the towns to which the Company wanted to ship, and by putting across the top the various shipping points; and then by entering from the freight tariffs into the various columns the rates from each shipping point to the various destinations. The rates
34676 were carried in cents per hundredweight and there was sufficient space to insert changes in rates. A separate book had to be prepared for each state in which the Company sold. This involved considerable work and required stenographic aid. It took time, and while I do not remember the cost, I am sure that it cost much more than similar books purchased from the Cement Institute. The resulting rate books were loose-leaf books almost identical in form to those now published by the Cement Institute, except that the Cement Institute books are condensed and do not provide spaces for inserting changes in rates.

It was also necessary for me to make up a conversion table for the Lumbermen's Company. That conversion table was exactly similar to the ones sent out with the Institute rate books. In converting the rates from cents per hundredweight into cents per barrel, fractions were handled by dropping anything below a half cent and by carrying fractions of a half cent and above as a full cent.

When I went with the Altoona Company in 1912 or 1913, I found that they had prepared and were using similar freight rate books. I was responsible for keeping these books up to date, and I hired a railroad man to do this.
The rate books of both the Lumbermen's Company
34677 and the Altoona Company carried both base and non-base shipping points.

When I went with the Knickerbocker Portland Cement Company at Albany, New York, in 1924, a subsidiary of the International Portland Cement Corporation, I found that it was using similar freight rate books in its traffic department.

Based upon my experience in the cement business, I consider complete and accurate freight rate information absolutely necessary. If there were no books available, such as the freight rate books published by the Cement Institute, it would be necessary for each company to compile such information in book form or otherwise.

There is no question but that it is more economical to purchase such books from the Cement Institute than for a company to compile and maintain the necessary information through its own traffic department.

Use of Institute Freight Rate Service.

I was familiar with the reasons which prompted the Institute to undertake the issuance of rate books and the establishment of a freight rate service. The purpose was to provide an economical source of accurate freight rate information in convenient form. There was no
34678 other purpose.

There was no idea in my mind, or to my knowledge, in the minds of the other trustees of the Institute, when we authorized the issuance of the rate books, that these books would be used as "instruments of price maintenance," nor do I consider that they ever have been so used.

So far as my company is concerned, it would make no difference in its prices if we engaged a full traffic department and compiled every rate from the official tariffs rather than using the Institute rate books. But the use of the Institute rate service saves us a lot of money and gives us accurate rates in convenient form.

The Institute has never issued any instructions to my company, or, to my knowledge, to any other subscribers to the rate books, that the rates in the Institute books are to be used whether right or wrong. The Institute has never, to my knowledge, used any coercion to compel subscribers to use the rates in the rate books whether right or wrong. The Institute has never issued any instructions to my company, or to my knowledge, to any other subscribers to the rate books, that in case of a change in freight rates, the new rates shall not be used in quoting prices until the new rates have been promulgated
34679 to the industry through the Institute's freight rate service. It is the policy of my company, if it has knowledge of an erroneous rate appearing in the Institute rate books, to use the correct rate.

Of course, when Lone Star subscribed to the Institute freight rate service, it would have liked to have seen its competitors subscribe to the service. The more the number of subscribers there were, the less the pro rata cost

would be. None of the officers of Lone Star ever brought any pressure on other companies to subscribe for or use Institute freight rate books. Lone Star has never had any understanding with the Institute or any competition in connection with the use of any freight rate books. Lone Star considered that with the greater accuracy of Institute freight rate books over other compiled rate information, their use by it and by competitors would reduce the number of accidental changes in price quoted for cement at destination. Where an inaccurate freight rate is used by a competitor in quoting a price and the rate is too low, the result might be the unintentional quotation of a reduced price which would prevent Lone Star being competitive for immediate business at the point covered by the quotation. In attempting to meet competition at
34680 destination, an inaccurate freight rate might result in quoting a higher price as well as a lower price. Variations in price brought about by errors in calculating freight rates cannot be called intentional or truly competitive price changes. It is necessary for Lone Star, in quoting its prices, to anticipate what the competition might be at the points where it sells, and to the extent that the Insitute freight rate books lessened the possibility of unintentional prices being quoted by reason of the use of inaccurate freight rates, I thought Lone Star would be better able to anticipate the actual competition at the various points in its sales territory. Dated March 14, 1940.

34681 *Cross-Examination by Mr. MacIntyre.*

Q. Mr. Hogan, on this point Mr. Leisure just questioned you about, the last question to which you made answer before the copying of the stipulation into the record about understandings and agreements bearing on that point, I will ask you this question:

Is'nt it your understanding that your competitors use a method that is no different in its essential factors in the building up the prices they quote from the method used by you and your company in building up the prices it quotes at destination?

A. Well, I don't know that the word "understanding" is there, but the prices we received from the men in the field would indicate they use about the same method.

Q. And it is your understanding that they do use such method?

A. As I say, from the knowledge we have of it, it appears that they do.

Q. Then that is your understanding, isn't it?

A. It is all right if you want to use that word,
34682 but I am putting it the other way. It is our knowledge we gain from our experience.

Q. Are you not aware your competitors also have such understanding and knowledge as to the method and policy in building up your prices, as you have so testified?

A. I haven't any knowledge as to what our competitors do except as a result of information which we pick up in the field. The fact that we find them quoting prices at certain destinations in territories where they have lower freight rates than we have, which prices reflect back to a constant figure at their mills; and we find them quoting prices similar to ours at destinations in the territory where we have lower freight rates, would indicate that they use the same method which we do.

Q. On this question of special prices about which you testified considerably this morning, can you cite, at this time, any instance giving the names of the parties, the times and places where you and your competitors have quoted and made any different prices to any dealer or contractor?

34683 The Witness: As far as our company is concerned, I have no information with me today, but we have that information of bids. In some instances, we have it where our competitors bid.

By Mr. MacIntyre:

Q. Can you name an instance where you have done such since the depth of the depression in 1931 and 1932, and prior to the issuance of the complaint in this case?

A. I think we started that in Mississippi in 1937
34684 before this complaint was issued.

Q. What time in 1937?

A. I would say around in the summer of 1937 when we started.

Q. And the complaint in this case was issued in the summer, if you recall.

A. I don't know when the complaint was issued.

Q. Between that date and 1931, can you cite any instances where your company and your competitors have quoted prices different from each other, and different from their published prices to any contractor or dealer?

A. The one price policy was adhered strictly except in 1931 and 1932.

Q. So you made none from your published prices?

A. We probably can produce evidence showing where and with factual statements or documents showing where our competitors have done—

Q. During that period between 1931 and 1937?

A. Yes.

Q. Will you produce that documentary evidence?

A. We will try to do it. I say, we probably can.

Q. That is, any documentary evidence showing that your competitors have departed from their published price and in doing so, quoted any different price quoted by your company to contractors and dealers, during the
34685 period from 1932 to 1937?

A. Let me get that clear in my own mind. You say "documentary evidence." What do you mean by that? If it is something we have to come in and show a man's quotation, we couldn't do that. We can show the information on which we worked, the information we had on it.

Q. What is the nature of that information?

A. That very often might be a contractor's statement, it might be a statement of a salesman, or it might be something put in such a way that it is convincing to us.

Q. It is a matter of someone making a statement to you of the taking place of something else?

A. That is, to some extent, true. There are some other evidences.

Q. What are the other evidences?

A. I think we have one or two cases of statements made by men who said they were willing to give affidavits to the effect there were lower prices offered them.

Q. Did they ever give you affidavits?

A. I think in one case there was.

Q. Will you produce that affidavit as well as documentary evidence showing the transaction?

A. That was a number of years ago. May or may not be in our files. I imagine it is.

Q. What year?

34686 A. I think in 1928, there was one, and one, I think, in 1930.

Do you recall any since that date until this?

A. Well, we have reports and statements and sometimes we have statements by contractors where they come

in and tell us what their prices are. Those are the things we have to work on.

Q. That is, of course, statements made to you by

A. Certainly.

Q. —Third parties?

A. No, not necessarily by third parties. Very often it is the men we are trying to sell.

Q. But they didn't show you the quotations from your competitors to that effect?

A. A man doesn't make such quotation in writing if he has any sense. That is done orally.

Q. We would like to have you produce any evidence of quotations in documentary form as to transactions that went through on the quotations or as to quotations, themselves, of prices in the manner we have been discussing.

A. I have—now, as I say, you say documentary evidence. Something that might be convincing to us, you wouldn't want to accept, but still we would consider that evidence for our own purpose.

Q. We are anxious to see whether or not it is 34687 hearsay, or whether or not it is something direct and will you produce it?

A. It is not hearsay, so far as we are concerned.

Q. You spoke about some dealer sales to W. P. A. in the City of New York?

A. Yes.

Q. At prices that were below those quoted by other dealers?

A. Yes.

Q. Can you cite any at the present time?

A. Wait a minute. That wasn't my answer. I didn't say below other dealers. I said at prices, in some instances, below or equal to the prices we quoted to other dealers. I didn't compare dealers' quotations at all.

Q. Can you cite any instances, in the City of New York, where dealers quote prices to the W. P. A. below the prices quoted to the dealers in New York.

A. I think I testified that was a public record and can be obtained. All those are public records.

Q. What did you have in mind when you made the statement you did in that respect?

A. The prices—each time a letting came out, they came in and showed me what their competitors were doing. We didn't have a chance to meet such kind of competition we

encountered. That happened, I would say, on every W. P. A. letting in the City of New York, since the W. P. A. started.

34688 Q. Do you recall any instances where dealer quotations were below your quotations to the dealer?

A. I can't recall any particular instance. I can find one I am sure.

Q. Will you produce evidence?

A. I would like to have the counsel say what evidence to produce.

Q. You say it is a matter of record?

A. Public record, yes.

Q. Will you produce certified copies of those records to which you are making reference?

Mr. Brick: I object to that question. That is getting entirely out of the line of cross-examination.

Trial Examiner Norwood: I think that he may answer as to whether he will produce them or not.

Mr. Brick: Let him ask off the record whether he will.

Trial Examiner Norwood: I don't see where that is important, or I don't know that cross-examination should go that far.

Mr. Leisure: I might say, as a matter of fact, your Honor, the Commission has got a lot of that evidence in their own investigation, and for some reason they did not see fit to put it in this record.

Mr. MacIntyre: I must disagree with counsel on
34689 that point. We have never been able yet to secure evidence of dealers quoting in New York City below the manufacturers' price. We would like to get some such evidence.

If the witness is able to get to it, we would like to have him bring it in.

Trial Examiner Norwood: In view of counsel's statement, I shall overrule the objection, and ask you to answer it.

The Witness: What is that?

Trial Examiner Norwood: Read the question.

(The question referred to was read by the reporter, as follows:

"Q. Will you produce certified copies of those records to which you are making reference?")

Trial Examiner Norwood: Whether or not you will produce that.

Mr. Leisure: That is a matter Mr. MacIntyre can take up with counsel.

Mr. MacIntyre: Yes, but I am asking the question of the witness.

Trial Examiner Norwood: Read it again.

(The question referred to was again read by the reporter.)

The Witness: I will have to depend on my coun-
34690 sel's advice on that, your Honor.

Trial Examiner Norwood: All right.

By Mr. MacIntyre:

Q. You spoke of a Colorado River Dam letting, at which time you and your competitors quoted prices below their openly quoted prices to the trade.

Do you recall that testimony?

A. No, I didn't testify that.

Q. What was your testimony, if you recall it?

A. I said, on every Colorado River Dam letting, there were special prices, and at one time we happened to be low, and they threw out the bids and re-advertised.

Q. Do you recall that most of the time on those lettings, you and your competitors quoted the same prices?

A. No, that is not my recollection and it is not a fact. There were special prices on each one of those lettings.

Q. That is, below the openly quoted prices to the trade but where they are different from your competitors?

A. Ours never was below the quoted price to the trade and that was the only time.

Q. Those prices quoted by your competitors were at the same level?

A. No, never at the same level.

Q. I think we have tabulations in the record.

A. You can read your tabulation and find I am correct.

34691 Q. You spoke about your one price policy.

A. Yes.

Q. You were referring there, were you not, to your policy of quoting a delivered price to one and all dealers at a particular destination?

A. Well, the question of quoting a delivered price is incidental to a one price policy. I think the—his Honor defined the thing correctly. It is a matter of quoting a price and adhering to that price, and not deviating.

Trial Examiner Norwood: That wasn't my definition. It was yours.

The Witness: I stand corrected.

By Mr. MacIntyre:

Q. That is, the quoting of a published price to all dealers at a given destination and adhering to such quotations; isn't that what you meant?

A. Has nothing to do with quoting to all dealers. One price policy is a matter of an established method of doing business, to establish prices and which you quote as a published price and you do not deviate from this published price.

That is what I mean by one price policy.

Q. What are those prices? They are destination prices?

A. They are destination prices in practically every case.

24692 Q. And differ at different destinations?

A. They are the published prices at the destination, wherever that might be.

Q. And they are different at different destinations?

A. Yes. The freight rate has a big influence on that.

Q. And your mill net resulting from such published prices at the various destinations, resulted in varying amounts at your mill?

A. That's correct.

Q. Now, referring to Respondents' Exhibit 2460 for identification, the large map with the pink and the green outlined areas: in the preparation of that map you took into consideration the existing basing point prices?

A. No prices.

Q. No prices?

A. No prices. The basing point price didn't enter into the consideration. That wasn't considered at all. What we depended on entirely was the freight rate—what the freight rates were from various mills to certain lines. We didn't consider prices. Price wasn't considered at all.

Q. That is, freight rates from basing points?

A. No, no. Freight rates from any cement mill.

Q. You took into consideration the level of the existing basing point price, though, didn't you?

24693 A. I did not consider prices at all. That is simply a computation of the area covered by the freight rates. It has nothing to do with prices.

Q. Isn't it a fact, Mr. Hogan, that if your basing point price at Norfolk, Virginia—

A. Yes.

Q. —Were different from what it is now, that irrespective of the freight rates, if it were figured on applicable freight rates, it would be different from what the green area is—that is, the green area would be different from what is shown there now?

A. That is something I didn't figure. I figured the freight rates only. I took no prices into consideration.

Trial Examiner Norwood: You can't tell him whether or not there would be a difference?

The Witness: If the freight rate was lower, or, rather, if the base price were lower, it would extend out. But what I sought to establish was a freight situation, not a pricing situation.

Trial Examiner Norwood: Well, if you should take that up on the basis of the necessity of varying your price of one or two cents a barrel on the quotations, would that extend that green area?

The Witness: Yes, if we, for instance at Norfolk, make it five cents or ten cents a barrel, to the extent our 34694 competitor didn't meet it at his mill on price, it would extend our green area.

Trial Examiner Norwood: You mean by this area that territory which you cannot go beyond without making a deviation?

The Witness: No.

Trial Examiner Norwood: Or coming below a competitor's price?

The Witness: No, I didn't take price into consideration. I simply took that black outline there, and that represents the point farthest away from the Norfolk mill, where our freight rates are equal or lower than those of other mills, without reference to prices or anything else.

By Mr. MacIntyre:

Q. Let's attempt to straighten out the green area. On the basis of the existing freight rate and present existing prices—

A. Yes.

Q. —That is where your freight advantage reaches?

A. I have nothing to do with that—with basing point prices. I took whatever freight was from some cement mill.

Didn't consider basing point pricing in that. It reflects nothing but the freight rate.

Q. I would like to go over to the map and call
34695. your attention to this green area.

A. Yes.

Q. In and around Indianapolis, Indiana.

A. Yes.

Q. What did you add to the freight rate in order to establish the outline of that green?

A. I added nothing whatever. I simply took the freight rate and showed at this mill—the freight rate from this mill and that mill equalized.

That is all there is. There is no such thing as basing price or consideration of price there at all.

Mr. Leisure: Mr. MacIntyre, what mill are you referring to? The record doesn't show.

Mr. MacIntyre: I said Indianapolis.

The Witness: Limedale, is what it is.

Mr. Brick: Which, the other mill?

Mr. MacIntyre: The witness pointed to the mill below, which is the Mitchell, Indiana, mill, of the Lehigh Valley Company.

By Mr. MacIntyre:

Mr. Hogan, if the Lehigh Company, at its Mitchell, Indiana mill, put in a base price of one dollar and forty cents and your bare price at Limedale, Indiana, was one dollar and seventy cents, and the freight rates remained as they are, today, would the green area be as you have shown it?

34696 A. Yes, because we put in one dollar and forty cents the same date.

Q. But, I am assuming—

A. You are assuming something that doesn't happen.

Trial Examiner Norwood: Can't you answer on that assumption?

The Witness: Why, certainly, the green area would be restricted if we did that.

By Mr. MacIntyre:

Q. It would practically be wiped out, wouldn't it?

A. Yes, practically.

Q. And if that situation were reversed, and yours was one dollar and seventy cents and Lehigh one dollar forty cents your green area would reach to almost the extremity of the outlines of the pink, wouldn't it?

A. I didn't figure it, but I imagine it would go a long way down there. Didn't figure it. No, it wouldn't go that far, because when you got down to Mitchell and below Mitchell, there would be a difference sufficient to offset it.

Q. Wouldn't the same result obtain with respect to each of these green areas; that is, as to the outlines of the shrinking and expanding, depending on the application of differences in the basing point price by the different companies involved?

34697 A. Why, most assuredly, if the manufacturers of cement would stand still and let somebody take and—take their territory, that would happen. Certainly.

Q. And the outline you have there of the green today, is based on an assumption that the price as quoted in the mill by one of the basing point mills, or by any one of the mills in and near the territory, would be no different from the price quoted by your mill; is that correct?

A. In describing that map, I think yesterday and again today, I pointed out that map is only compiled to show where the freight rates break between cement mills.

The price situation didn't enter into it. That is something we can't foresee. That is something no one at all can tell by compilation. All this is, is a compilation of freight rates to show where freight rates equalize to destination.

Q. But I am attempting to find out the prices—just where the price situation does fit in since you didn't go into it. I am asking you now if the prices were the same in each of the mills in and around the green area that the green area would remain the same?

A. Absolutely.

Q. But they would remain the same only so long as those mill prices remaining exactly the same?

A. That is true, yes. That is true because the

34698 freight rate makes the difference.

Q. And that is true as to each of the green areas on the map?

A. Yes, I would say that is true as to every place.

Q. In the light of the explanation you have just given, all of your statements about what would happen to you and your competitors if an f. o. b. mill price were adopted by either you or by your competitors, you assume that the base price or the mill price of each would be equal; did you not?

A. I didn't assume anything in making that, but that would be the basis on which that green area would remain where it is, yes.

Q. You stated what would be the effect of f. o. b. mill quotations?

A. Yes.

Q. And didn't you base your assumption in that respect with reference to the statements about the map on the assumption that all prices as quoted by these various companies and mills would be the—

A. That the base price would equalize, is that what you want?

Q. Would equalize, yes.

A. Yes, I think that is true.

Q. And you also assumed, in that respect, that
34699 shipments would be made by railroad at the existing railroad rates?

A. Yes, in compiling that map, I did.

Q. And you also assumed that there would be no change in any distribution method by you or any one of your competitors?

A. There is no—I took this into consideration: there is no distribution method that could change—by using it could change those established areas.

Q. What about silos? Can you tell—what about silos, water shipments, utilization of water shipments up and down the Mississippi and up and down the river on which Spocari mill is located, and the establishment by you of silo for use of the Baltimore mill?

You didn't consider all those facts in your answer as to what would happen?

A. I never considered the establishment of silos. In fact, I think they are impractical, unless, as I testified, they are in some great city. The question of water transportation I have considered greatly. My experience has been that it is a fallacy, in most cases, it just doesn't exist.

Q. You didn't take into account any consideration you have given to water transportation in giving the answer you are referring to with reference to this map, and making statements about the effect of f. o. b. mill prices?
34700 A. No, it isn't included in that map. We thought about it in connection with Hudson River-New York deliveries.

Q. And by the same token in that respect, you did not consider shipments by trucks?

A. Shipments by truck would not extend the green area because it would have to go out fifty-sixty, seventy miles away, which makes it rather uneconomical for trucking.

Q. You didn't take the matter of shipments of Portland cement by motor truck into consideration, when you made the statements?

A. No, except in localities like the city of Houston, or the city of Dallas, some place like that.

Trial Examiner Norwood: That map has been drawn merely to show effects with respect to your mill?

The Witness: Yes.

Trial Examiner Norwood: And not any others? It doesn't cover the Detroit situation?

The Witness: That outline of pink area is simply where salesmen travel. The green area is the territory where we have advantageous freight rates.

Trial Examiner Norwood: For your own company?

The Witness: That is all.

Trial Examiner Norwood: Did you consider the situation at all as to the other mills, that is, in drawing that map?

34701 The Witness: As I testified, your Honor, these black outlines of those green areas represent the place where the freight rate between our mills and some other cement mill, regardless whether it is a basing point mill or what it is—some other mill—where that breaks—where they equalize. I think I testified that.

By Mr. MacIntyre:

Q. In preparing this map, and making the showing you have made on it, Mr. Hogan, did you take into consideration any differences in the ability of one cement mill—your company or within one company, as against another in the industry, to produce cement at less cost than another?

A. No, as I stated repeatedly, the only thing I used in making that map was the freight rate.

That is all I did with that map. All those other things can be determined on the side but that is what I did on that map.

Q. The only thing then, your map shows, Mr. Hogan, are the freight-wise advantages and disadvantages of your mills—your competitors' mills, with respect to each other; is that correct?

A. No. It shows the area in which our company has as low or lower freight rate than any other mill.

Q. Isn't that what I asked?

34702 A. Right. That has been my testimony right along. You put it a different way. I don't know what you mean.

Q. It shows within which territories your mills have freight advantage over a competitor?

A. Yes.

Q. And nothing else?

A. Other cement companies between one and another might have, say, great advantages or disadvantages that don't reflect there. That is only with relation to our own mill.

Q. With relation to the freight advantages as between your company and your competitors, and it shows nothing else other than the territory in which you have solicited?

A. Yes.

Q. Mr. Hogan, don't you know that the cement industry, the Portland Cement Industry in this country has a capacity to produce Portland Cement at a rate of approximately twice the consumptive demand?

A. That is true of the last ten years. It wasn't true prior to that time.

Q. For the last ten years it has been true?

A. Yes, that is true. That has been brought about by a let-down in business.

Q. But despite that, you are acquainted with the fact that new mills have been built within that ten-year period?

A. There have been a few. Very few.

34703 Q. And one of those mills was built in the Lehigh Valley district, wasn't it?

A. Yes, largely by foreign interests.

Q. Taking your map, Respondents' Exhibit 2460, when you ship cement from that mill to points in the upper part of Maine, your Hudson River Mill, freight is paid on that shipment far in excess of the payment of freight on a similar shipment from the Thomaston or Rockland, Maine, mill of the Lawrence Company to the same point; is that not so?

A. I don't know the spread we have there.

Q. But it is considerable, isn't it?

A. You have got this—in looking at that map you have got this to consider: I am talking now, as a traffic man.

The farther the distance you ship your cement, the lower freight rate per mile you get. You can ship up into Northern Maine as against the mill at Thomaston, Maine, and while the rate would be different, the difference may not be so great because of the lower rate per mile you get on the longer distance?

Q. There is a substantial difference?

A. I would say so. I would think it would be.

Q. And when you make a shipment from either your Dallas or Houston mill to a point in southeastern New Mexico, freight is paid on such shipment far in excess or, I would say, in excess substantially of what would
24704 be paid on a similar shipment from San Antonio or El Paso, Texas?

A. No, I think the freight rate would be lower from Dallas than San Antonio. It would be higher than from El Paso.

Q. It would be substantially higher than from El Paso?

A. I would think so, yes.

Q. Yet you do make shipments into southeastern New Mexico?

A. We solicit business there but there is very little business there.

Q. Can't you tell us whether or not you get shipments into there?

A. I don't know how large it is. Five hundred to a thousand barrels a year.

Q. You do make some?

A. We do make some.

Q. You testified on direct examination you have made shipments into the City of Chicago.

A. Yes, just small quantities. Don't do much business there.

Q. What is the freight rate? The freight rate is substantially higher from your mill at Limedale, Indiana, than from the Buffington mill of Universal-Atlas and the La-Salle mills of Alpha and Marquette Companies?

A. Yes, our freight rate is higher. I don't know the exact difference. I think we have to absorb as much as twenty-five or twenty-six cents a barrel.
24705 Twenty-five or twenty-six cents a barrel?

A. Twenty-six, maybe. I don't remember offhand.

Q. Isn't it a fact that the Marquette and the Alpha

Company ship from their mills at LaSalle, Indiana, into Indianapolis?

A. Yes, I think they both ship some. Yes, I think that's true.

Q. And to the extent they do, there is a cross-shipment of cement to the tune of about twenty-five cents a barrel freight; isn't there?

A. I don't know what the difference is. Wouldn't be in excess of that. I think it would be a little under it.

Q. We will say approximately twenty-five cents, and be approximately correct.

A. I don't know that it would be correct. Be close to it.

Q. Do you consider that those of the buying public who purchase Portland cement produced and sold by your company, are entitled to all the benefits and advantages possible for them to obtain from free and unrestricted competition if such were practiced by cement manufacturers?

A. I think they are entitled to it and I think it is practiced by the cement companies.

Q. Do you think they are getting all the benefits possible for them to obtain—

34706 A. Yes, I do.

Q. —when they pay cross-freight to the tune of twenty-five cents per barrel as is the case in cross-shipping from your mill in Chicago and by your competitors from LaSalle, Indiana—Illinois—into Indianapolis?

A. Yes, I think they are.

Trial Examiner Norwood: Can you explain that answer?

The Witness: Because the price made in Indianapolis is one made by our company. In order to run their cement plant at volume, they reach out and find markets. They establish the price in their territory at which they would like to sell their cement. Whatever shrinkage they have to take simply comes out of their pocket.

Trial Examiner Norwood: He was asking you that line of questions on the aspect of benefits for the public there.

The Witness: But the public is not losing anything at Indianapolis. The public is not losing anything because our mill is making the price. The other fellow is not.

By Mr. MacIntyre:

Q. On that point, who does pay that freight of the cross-freighting?

34707 A. The Marquette company, whatever company it was. They would be the one losing that.

Q. Where do they get the money to pay that freight?

A. Out of their general business.

Q. Where does that come from?

A. Out of their general business. Made up of general—

Q. And the public pays their money into the general business?

A. Yes.

Q. So it comes from the public, ultimately?

A. Yes, but the effect on the price is not reflected by that one shipment there. Their price is made to sell.

Q. We are talking about that particular shipment.

A. As pointed out, they do that to get volume to keep down their cost.

Q. Would it have been necessary for them to have reached out for such volume, if they and their competitors in the cement industry had not built mills so that within the past ten years they were able, through such facilities, to produce more than twice as much as the consumptive demand?

A. Now you are getting on a question that is hard to answer directly. In the first place, it isn't—there isn't a cement mill in this country with the exception of a few which were built in the last ten years, that wasn't built to serve a demand at the time it was built.

Demand varies in different sections of the country
34708 and all of those mills were built to produce to meet the demand.

In 1928, the biggest demand in the United States was on, but all cement plants were not busy because in some sections, it was light. But in those sections there had been some time when the building of that mill, that particular mill was justified.

Q. I believe you said that applied to those mills built some years ago, but as to those built in the last ten years?

A. No, those mills built in the last ten years had no reason for being built.

Q. But they have been built in the last ten years, haven't they?

A. I don't know how many. I recall two.

Q. It is now necessary for them to reach out and involve cross-freighting in order to survive on their part?

A. Correct.

Q. And isn't it a fact that some of them, some of the older mills have enlarged their facilities and improved

their facilities within the past ten years, and as a result thereof, find it necessary to reach out and involve some cross-shipping and freight in order to survive?

A. I don't know what our competitors have done in enlarging their mills. Haven't any idea.

Q. You have enlarged some of yours and im-
34709 proved them, have you not?

A. No, not in the last ten years.

Q. Haven't you improved the Spocari mill in the past ten years?

A. No, simply made the mill usable.

Q. You improved it?

A. We haven't increased production by one barrel.

Q. You have had it closed down since 1930, haven't you?

A. 1932.

Q. And you have found some means of improving it so that you could put it back into production, and you have put it back into production, haven't you?

A. Yes, there was a big road program in the State of Mississippi, and the demand came that made it possible to do something. There was a big road program on in Mississippi, and that mill had the lowest freight rate over three-fourths of the state.

The road program is still going on and there is still prospects of selling from that mill. With that road program on, and the possibility of a demand, I couldn't allow the mill to lie idle; I couldn't justify it to my stockholders.

Q. But when you started the Spocari mill, you didn't shut down your Birmingham mill?

A. No, because we started it for the purpose of
34710 handling the Mississippi business right in that territory.

Q. So, when you started both of them, they both had to reach out over the territory that they had freight advantage in, in order to get tonnage satisfactory to you?

A. If Spocari could get a reasonable part of the road program in Mississippi, we wouldn't have to reach out. It is the other fellow's reaching out that keeps us from getting it.

Q. Then you were speculating when you started the Spocari mill upon your probable success in getting the road business?

A. I didn't speculate in the least. I consulted my at-

torney, and he told me I couldn't justify my action, in view of the prospective demand in that section, if I kept the mill closed.

Q. No one told you in Mississippi, you were going to get that business?

A. No, of course not.

Q. You speculated on that?

A. We speculated on our ability to sell it.

34711 Q. Mr. Hogan, yesterday, in response to some of Mr. Leisure's questions, when you were referring to the map, Respondents' Exhibit 2460, and stating what, in your opinion, would occur to some mills if an f.o.b. mill plan of quoting and selling were adopted, you stated as to some you believed they couldn't survive. Do you recall?

A. Yes. In the Lehigh Valleys.

Q. Well, now, I ask you if you believe that with the productive capacity more than twice the amount of consumptive demand as is the case, you believe that all mills, the old, the more inefficient, and so on, are entitled to survive under any pricing method in the cement industry?

A. Well, whatever type of mill a man has, it represents an investment. He is entitled to it on his investment.

There is the possibility that—

Q. You are looking at it from the viewpoint of the cement manufacturer?

34712 A. Yes, and the stockholders.

Q. And the stockholders, yes. But, looking at it from the viewpoint of the public as buyers and users of cement, what would you say?

A. Whether they had a right to survive or not?

Q. Whether they are entitled to use any pricing method that would permit the survival of all mills when there are more than twice the productive capacity necessary to meet the consumptive demand?

A. I don't understand they are using such pricing methods.

Q. I didn't refer to any pricing method. I say any pricing method.

A. As I say, I do not—

Q. Would it permit them to survive?

A. I don't know how you could conceive any pricing method would permit them, if they are inefficient, to survive.

Q. All that are in the business are surviving, aren't they, under the present method of pricing?

A. After a fashion. Some are living on past earnings, and some are living on depreciation charge-offs. They are not all making money, if that is what you want.

Q. They are not going out of business, are they?

A. Not many, no.

Q. Well, some new ones have been built in the past ten years?

34713 A. Yes.

Q. Will you answer the question as to whether or not you think that is, looking at the problem from the point of view of the buyer and user of cement, that all such mills as are in existence are entitled to survive?

A. I think that is a matter for the individual mill company, the owner to decide whether they are to survive or not.

Q. But I am asking for your opinion, looking at it from the viewpoint of the public, the buyers and users of cement.

Will you please answer the question from that viewpoint?

A. I don't think it has any relationship from the viewpoint of the buyer and consumer. I don't think cement would be cheaper if several of them went out of the business.

Q. That doesn't answer the question.

A. You are asking me to express an opinion.

Q. Yes.

A. About whether or not a competitor cement mill should stay in business. I can't answer that.

Q. I am asking you to express an opinion from the viewpoint of the public, the buyers and users of cement.

You expressed an opinion yesterday, and again this morning from the viewpoint of the manufacturer.

34714 Now, I am asking you to, from the other side of the picture, answer a question as to your opinion.

A. You are asking me to express an opinion as concerning the consumers, the buyers of cement?

Q. Yes.

A. I don't know that I am qualified to answer that.

Q. You are an expert cement manufacturer, but not an expert member of the public, is that correct?

A. Well, I am, when it comes to discussing some problems, but not all of them.

Q. Well, when you spoke of your opinion as to the in-

ability probably of some cement mills not being able to survive under the particular methods, do you consider those methods to be more competitive or less competitive than the ones now used?

A. I think they would be less competitive over a wide territory.

Q. How would the practicing of less competition force anyone out of business, Mr. Hogan?

A. Because they would be restricted as to the territory they could cover, that is what I was talking about. Markets they now enter would be denied to them where they would be no longer able to serve, and they would be denied the territory where they wanted to go for business.

Q. What force would restrict them?

34715 A. The f.o.b. mill selling uniform price.

Q. Well, expressing the force in terms of competition or lack of competition, into which one of those two classes would you put the force?

A. I would put the force into the—now, basing it on the uniform f.o.b. mill, I would put it on the competition. it would be a case of survival of the fittest, dog eat dog policy, until the weaker passed out.

Q. Now, you said, Mr. Hogan, this morning, that in the early days, in your experience in the cement industry, certain efforts were made by cement manufacturing interests to secure adjustments in freight rates?

A. Yes.

Q. I will ask you if two of those efforts were not directed toward securing and successfully securing blanket rates from the Lehigh Valley district to outside points and from the gas belt district to outside points?

A. I am not at all familiar with the Lehigh Valley district. I have been in this eastern section only since 1924. The efforts I spoke of was the independent mill, or somewhat I would call independent mills because they are outside of the Iola district, and they were trying to each get advantage of the other.

Q. You were in the Iola district and gas belt district?

A. Yes.

34716 Q. In those days. Wasn't one of the efforts of adjustments of freight rates, the successful blanketing of all rates out of the gas belt district; that is, to all points?

A. As well as I can remember, as long as I have known

those rates, they have been blanketed after you got a short distance out of the gas belt, and I don't think it has changed materially.

But the big effort was to get the advantage brought down that the Kansas mill, Bonner Springs, and the mill east of Kansas City had to the Kansas City market and markets north thereof.

The gas belt was always trying to work that down.

Q. You mean to say the blanket rates from the gas belt district to all outside points beyond certain distances were, in effect, in 1910, when you got into the cement industry?

A. Not entirely, but there was a general working of that arrangement. It didn't work until you got out sixty or seventy miles, the natural mileage scale.

Q. When and under what circumstances did that become a blanketing force in Iola?

A. I think that was done later through the Interstate Commerce Commission hearings—I have forgotten the number of the case—between the Iola Traffic Bu-
34717 reau—I think they handled that—we were never a party to that.

Q. Didn't it take the form of some of these efforts for adjustments of rates that you referred to this morning?

A. Yes, it would be one of those efforts.

Q. When was that?

A. That was going on almost continuously from the time I went into the cement business until the Commission finally came out with that idea of making a mileage scale rate and that kind of blocked the whole thing.

Although there have been efforts made in recent years again by the Iola group to reduce freight rates into Kansas City, while holding freight rates from Bonner Springs to Kansas City, where they are.

Q. About when was the action taken to keep the freight rates—about when was the action taken to complete the blanketing of freight rates in this gas belt district?

A. I can't give you the history as to that because I was not in on that at all.

Q. Can you give us the approximate date?

A. I would say along about 1914 or 1915, back around there.

Q. About 1914 or 1915?

A. I would say. That is purely a guess on my part. But it is as nearly as I can recollect it.

Q. You stated this morning, that in your experience that applications for freight rate adjustments took
34718 a particular pattern and that the pattern had not changed, and to your knowledge, and of your experience, there was a change in that case from a lack of blanketing of freight rates from a particular district to all points which had not been the history of freight rate making in the past; that is, previous to that time; is that correct?

A. I don't think I said the applications took a pattern. I said the freight rate—the way the railroads figured out rates made a pattern.

That is the way it happened. I would say that blanketing came about largely through the suggestion of the Interstate Commerce Commission.

I attended a few of those hearings, but do not remember just exactly what year. It took a long time.

Q. It was at the instance of the shippers in that district; wasn't it?

A. I am not sure of that, but I think it was. I think that Iola Traffic Bureau, whatever they called it, was behind it. I'm not sure of that.

Q. Do you, in fact, regard that as a departure from the experience you had known previous thereto?

A. There was a departure in the way of application of rates, although, as I previously testified, it didn't make much change in the freight rate structure because those rates were pretty much on a parity after you got
34719 out fifty, sixty, miles, it didn't make much difference.

Q. Before the blanketing took form, whatever there was of a difference in the costs, took place in the first sixty miles?

A. Not such an awful difference. The railroads would give a freight rate in those days to some certain shipper to a certain town that was out of line with what the real mileage rates were.

Q. You had epoch-making history in freight rates at that point compared with what you had previously?

A. I would say when the Interstate Commerce Commission adopted the mileage scale, the placing of freight rates was epoch-making.

Q. Do you think that all epoch-making has passed and we need no more?

A. That would be guessing.

Q. Wasn't that what you said this morning, you didn't think there would be any more?

A. I said railroads wouldn't start any movement or development by themselves.

Q. You were making that statement from a conclusion?

A. No, I was basing my opinion on experience.

Q. In your experience, what was this radical change which you have considered?

A. Which was approved by the Interstate Com.
34720 merce Commission—I don't know but what they adopted it,—I mean suggested it.

Q. While we are still on freight rates, I notice in your testimony, the statement concerning the use of a, a statement concerning the use of conversion tables.

A. Yes.

Q. In the calculation and application of freight rates?

A. Yes.

Q. And the placing of such conversion table in the freight rate book of the Cement Institute rate book, you recall that portion of your testimony?

A. Yes.

Q. I will ask you, as an experienced traffic man, whether a freight rate total per barrel, as calculated through the use of a conversion table after fractions are dropped, or added, within the calculation for the per barrel rate, that you can, through the addition of such totals, by the number you have in a car, arrive at a figure which will correctly show the freight charges that will be made on a freight bill by the railroad company for the handling of such carload of cement?

A. Maybe I didn't understand your question, but it all seems to be in the last sentence.

34721 The Witness: I have never attempted to compute it that way.

We always used the conversion table to convert a freight rate per hundred weight to a freight rate per barrel and used that converted rate to multiply by the number of barrels and get what the freight charge was on the carload.

If you want to have us fix that on one barrel and add up the number of barrels, well, you would probably arrive at the same total, but the conversion takes freight rate per hundred.

By Mr. MacIntyre:

Q. Dropping all or adding all fractions, as the case may be?

A. Dropping or adding fractions, as the case may be.

Q. On a per barrel basis?

A. On a per barrel basis; that's what we do.

Trial Examiner Norwood: If you figured out the total weight of the car, and figured out the freight on hundred weight rate, would it get a different total?

The Witness: Your Honor, two different times when I was engaged in traffic work, we figured it out over a period of time. The difference in result, when using the fractions or dropping them, was so infinitesimal it would not compensate for using them.

We have never used anything else but the freight
34722 rate per hundredweight converted into the freight rate per barrel as our method of doing it.

By Mr. MacIntyre:

Q. When you say the difference would be small, do you mean it would be small in the terms of several cents per carload?

A. Yes. It would be around a few cents per carload on an average.

Q. You do get that percentage?

A. It would wash itself out. Some high, some low.

Q. But it does not coincide with the per barrel rate, does it, when you use the conversion table?

A. No, I wouldn't think it would. I think it washes itself out on a carload—not on a barrel, but on a carload basis.

Q. There would be a slight difference?

A. Might be, but I say it washes itself out. Our using those fractions wasn't something new to the cement industry. That is the commercial practice. It has been in the business a long time.

Q. The fact of the business is the railroads figuring freight on the shipment of cement, figured it in a manner of dropping or adding the fractions on the last cent within the carload, if it is a—if it comes out to a fraction?

A. If they are doing that, it is something new to me. I haven't been in practice, though, for twenty years.
34723 I have never seen it while I was there. In fact, it was my business for two or three years to figure

freights. I was revising clerk and chief rate clerk, and never heard of such an idea.

We never used it.

Q. You mean, as I understand it, if the railroad is computing charges on freight bill on the handling of a carload of cement, if it had a fraction of a cent out at the end, after adding all its rate, for all the hundred weights, it would not add the fraction of the last penny?

A. You mean by that—let me understand the question—do you mean by that if they figured out for a particular carload of cement, the freight was eighty-nine dollars and eighty-four and a half cents, whether or not they would make it eighty-nine dollars and eighty-five cents?

Q. Yes.

A. That is my method.

Q. They would do it that way?

A. Always did it that way.

Q. But they wouldn't add or drop fractions for each barrel?

A. Yes, they take the freight rate per hundred, multiply the weight of the car, and arrive at that figure.

Q. But they do not compute it by cars?

A. No, but they do the same way we are doing it.

Q. I mean, by barrels?

34724 A. It works out identically the same the way we figure it.

Q. I understood you to say there would be a few cents' difference.

A. No, I said, take a fraction and add it or drop it and over a period of time there would be a few cents' difference but as a general proposition, it will wash itself out. It's a very small thing. We figured it just once, the first cement company I was with, and then they dropped it.

Q. What do you mean by "washing itself out"? What you mean is over a great number of transactions during a period of years, at the end of the year, it would come out even?

A. I think eight of ten cars in one day, it would wash itself out.

Q. Is it likely to wash itself out at the end of the day?

A. It is likely to wash itself out at the end of the day.

Q. Maybe some over, and some under?

A. There may be some over and some under a couple of cents.

But if you didn't use the conversion table in the quoting—that is, in building up a price to quote on a per barrel basis, you would be quoting, in many instances, fractions of a cent per barrel, wouldn't you?

A. We would not. We would follow the general
34725 commercial practice of splitting them on the half cent.

Q. You spoke of the commercial practice. Who, in the commerce world, outside of the Cement industry—

A. The railroads, for one, do it right along.

Q. Figure a cent a car weight?

A. On the freight rate—that is where I first got that conversion table idea,—where we dropped anything below the half cent and added anything above.

Q. That was on the total weight of the car?

A. Yes.

Q. For the total car?

A. Yes.

Q. I am talking about per barrel.

A. It would work out exactly the same on that.

Q. Can you tell me some one that adds on or drops their fractions other than cement manufacturers on the per barrel—keep to the per barrel basis?

A. We are not dealing just in barrels and stuff. We buy other stuff. But I don't know anybody that doesn't follow that practice, put it that way.

In figuring those pennies, it is so damn much of a nuisance you couldn't pay a man's time to do it.

Q. One customer, though, ordering a one hundred car order of cement, and is to be billed for the cement on the total order, providing it was to be shipped within
34726 fifteen days, those few cents per car would begin to add up on him, wouldn't it?

A. Not a great deal at any time.

Q. Provided—

A. A man dealing in one hundred barrel orders and let's assume he got twenty cents on a car, one hundred car order, he would have a very small amount of money in the percentage involved.

Q. Twenty dollars?

A. Yes. And he would probably have thousands of dollars invested, and twenty dollars mixed in some place.

Q. But you would be twenty dollars different from your competitors on the quotation of the price, if one competi-

for followed one method and another another method, wouldn't you?

A. May in some cases, and it may be high in others.

Q. But since you all use the same method, you come out at exactly the same spot?

A. Yes. I think they all use about the same method of figuring.

Q. Keeping in mind the use of freight rate books for shipping purposes—

A. Shipping purposes.

Q. Shipping purposes, why is it necessary for rates to be shown in such books from all shipping points to a particular destination, when, as the traffic man in your
34727 company, would be concerned with shipments only from your mill to the given destination?

A. If you are going to use that exclusively for shipping purposes? I think that is your question?

Q. Yes.

A. Which, of course, isn't done, but if you are going to do that, we don't have to have all that.

Q. You don't need that information for shipping purposes?

A. No, not entirely.

Q. Do you need it at all?

A. I shouldn't have qualified it. No, you don't need it for shipping purposes.

Q. For what is such information used?

A. It is used in the compilation of rates from all mills so that we know what our competition is.

Q. In compilation of all rates of all mills in calculating quotation price?

A. In figuring the price at destination. It makes up part of the expense of getting it to destination.

Q. Of course, when you speak in that portion of your stipulated testimony, about the expense of compiling a freight rate book, you of course included in that the expense of the—expense of determining freight rates from all basing points and non-basing points to all given destinations?

34728 A. Certainly, you have that information.

Q. While you were a trustee of the Cement Institute during 1934, Mr. Hogan, do you recall having received from another of the trustees, Mr. Charles Baumberger, Jr., a communication concerning the adoption of this freight rate service for the State of Texas?

A. I have no recollection of that. If you have it, I probably received it. I have no recollection of it at all.

Q. Well, to such extent as you have received from your competitors communications of that character and you have applied to such communications you have carried on discussions with them concerning the adoption and use by them, and by your company, of the freight rate service of The Cement Institute?

A. I haven't any recollection of ever discussing with my competitors the use of the freight rate book. If Mr. Baumberger wrote me a letter, I do not recollect it.

Q. In a portion of your testimony which has been incorporated in the record by stipulation, you have stated that no cement company owns any substantial amount of Lone Star stock.

What do you mean by the use of the word "substantial" there, Mr. Hogan?

A. Well, it is possible that some cement executives, or possibly companies, as far as that is concerned, might own some of our stock, but it doesn't appear on our stock list.

We never know what is being held in brokerage offices.

Q. You are informed, from time to time, that executives of other cement companies as well as the corporations, themselves, have bought and held stock in the Lone Star Company?

A. I have been told of only three people that have told me they owned stock in our company. One was—two of them were the Messrs. Boettcher of Denver and the other was I think, Mr. Young, who had some, but when I became president, he sold it. He told me that he was afraid of the new management.

Trial Examiner Norwood: Was that stock listed on the Exchanges?

The Witness: Yes.

By Mr. MacIntyre:

Q. That is Mr. Young of the Lehigh Company?

A. Yes.

Q. What cement companies own these quantities of stock which you stated in this portion of your testimony did not amount to any substantial quantity?

A. I was referring to the Boettchers in that testimony. They are both with the Ideal Cement Company of Denver.

Q. Did you have any others at the time?

34730 A. No, I have no knowledge whatever, Mr. MacIntyre, of anybody else in the cement industry owning any of our stock. We have several thousand, I think close to twelve thousand stockholders, and I don't know who they are.

Q. Mr. Hogan, do you recall at this time, the reasons that you stated in your reply to the Professor Burns and Clark questionnaire as to why you discontinued loading of buyers' trucks at Lehigh Valley?

A. I never saw the Burns and Clark questionnaire. I turned that over to Mr. Koch and had nothing to do with it.

Q. He had authority to—

A. To make the answers, whatever they were—

Q. —reply to the questionnaire?

A. —whatever they were. I never saw the form and never saw the answers.

Q. You never had any reason to take issue with the replies that were made?

A. I don't know what the replies were. I haven't any idea.

Q. You feel Mr. Koch is well acquainted with the circumstances?

A. I think so.

Q. So that he could make correct and proper reply?

A. I think he could make a correct reply, it might not be exactly what I would say, but I think it would be correct.

34731 Q. Mr. Hogan, is it your testimony that no dealers of yours, during the time you permitted them to send trucks to your mills for cement, ever carried loads of—truckloads of cement to their warehouses, and stored it?

A. Is that my testimony?

Q. For resale?

A. You say that is my testimony?

Q. Yes.

A. No, that isn't my testimony.

Q. Isn't it a fact that dealers did carry truckloads of cement when you did permit them to haul it on their truck from your mill to their warehouses and hold it for resale?

A. No doubt they did, but the fact is the general tendency was to let the cement mill carry the stock and they trucked only when they needed at the time.

Q. You carry it generally anyway, until they buy it, don't you?

A. Yes, have to.

Q. You didn't desire them to take any advantage of economy of avoiding storage on their part?

A. We wanted them to stock our cement so that they would have it available on call, a few sacks at a time. The tendency was to get away from that when they could truck.

Q. You wanted them to stock it at their expense?

34732 A. Sure. That is why they are dealers.

Q. Did you in accordance with the request that I made this morning, produce evidence of these special prices that you spoke about this morning?

A. No, I haven't been back to the office. Stopped close by for lunch. Didn't go back.

Q. How far is your office from the hearing room, Mr. Hogan?

A. About two blocks away, I would say.

Q. On direct examination, Mr. Leisure showed you Commission's Exhibit 7-A-B, which is the letter, or typed copy of a letter from John Treanor.

A. Yes.

Q. Dated May 17, 1934?

A. Yes, I remember it.

Q. Do you recall it?

A. I recall it.

Q. You stated in response to a question by Mr. Leisure, that you discussed that letter with Mr. Treanor. I believe you say you criticised him concerning some statements he made in it?

A. Yes.

Q. Can you give us the date on which you had that discussion with Mr. Treanor?

A. No. It was a short time subsequent to that letter.

Q. Matter of one month, two months after the writing of it?

34733 A. I think it was within thirty days of it.

Q. Where did the discussion take place?

A. In my office.

Q. Here in New York?

A. Here in New York.

Q. When you say you had a discussion thirty days after the letter, you mean thirty days after you received the letter?

A. I said within thirty days after the time. That is my estimate of it. Not positive.

Q. Within thirty days after you received the letter?

A. Yes, surely.

Q. Did you receive the letter—the copy of the letter from Mr. Rader?

A. No, I think it came from Mr. Treanor.

Q. Direct from Mr. Treanor?

A. I think he sent it to all members of the Code Authority. I was a member of the Code Authority at that time.

Q. Did you make any answer or reply to the letter in writing to Mr. Treanor?

A. I did not, as far as I recall, no.

Q. Did you make comments about the letter in writing to Mr. Rader?

A. I don't think so, no. I think I criticised the letter orally to some people I met.

34734 Q. In addition to Mr. Treanor?

A. Well, I think that is how Mr. Treanor came to see me. I believe, in talking with Rader, I criticised the whole thing and he apparently told Mr. Treanor of my feeling. I didn't know Treanor very well. I had very little acquaintance with him.

He came to see me about it because he understood I was very critical.

Q. Mr. Treanor came to see you about it?

A. Mr. Treanor came to see me.

Q. And he came to see you because he understood you had been critical of the letter in conversations to Mr. Rader, and others?

A. I am not sure it was Rader, but he was told about my criticism.

Q. When did you have a conversation with Mr. Rader and others, during which you criticised Mr. Treanor, and the letter?

A. I can't say where it was. I can't say who it was that told Mr. Treanor, but whoever it was he told me at the time, and I forgot who.

Q. Did some of it take place over long distance telephone, some of your criticism with others?

A. I wouldn't know that.

Q. Can you tell us as briefly as you can, the na-
34735 ture of the criticism you made?

A. That he had written about something indicting the whole cement industry on something he knew noth-

ing about. He had never had opportunity to know about the conditions of the cement industry east of the Rocky Mountains.

And he was condemning the whole industry on his experience in one little section of California.

Q. Mr. Treanor was re-elected trustee of The Cement Institute for 1935, wasn't he?

A. That was done by the manufacturers in southern California, not on a general proposition.

Q. He was accepted?

A. Yes.

Q. As a member of the Board of Trustees by the Institute as elected?

A. Certainly he was. I don't know but what he represented just the southern district of California, or maybe it was the whole state. But he was trustee.

Q. Isn't it a fact subsequent to this criticism you said you made of Mr. Treanor, he was selected by Mr. Rader as a committee of one to represent The Cement Institute in contact with Government officials in Washington, in his efforts to defend the basing point system?

A. The basing point system?

Q. Yes.

34736 A. I don't remember that we had anybody trying to defend the basing point system at that time.

Treanor came into this eastern picture through the Tennessee Valley Authority because of his friendship with Arthur Morgan, and then he got in the discussion with Mr. Fetter on the basing point.

And then later, he volunteered to go to see Mr. Fetter and see if he couldn't get him to explain to the Federal Trade Commission that a voluntary f.o.b. mill policy of selling by one company where it competed with f.o.b. destination prices by its competitors could not survive.

That came later. I don't know just what time it was. Whether it was about the time of that criticism, I don't know, but that is where he was in that picture.

Q. But it was also subsequent to the criticism that The Cement Institute nominated and elected him chairman of the Public Relations Committee, or maybe that is the Marketing Research Committee of the Institute?

A. It was the Marketing Research Committee, a continuation of the Code Authority.

Q. The record shows it to be a committee of The Ce-

ment Institute to educate the public on misconceptions in the industry.

A. Well, they may have put him on there because he was in California, they did that by district, I believe, largely.

34737 Q. Irrespective of your thought, he didn't know anything about the industry?

A. Well, if he was representing the State of California or the committee of The Cement Institute, or anything else, he would be there as a representative from the State of California to present their experiences to bear on the rest of the country.

He was there because he knew about that part of California, and he was not there because he knew anything about the rest of the country.

Q. Would you say that, despite the fact he served as chairman of the marketing research committee—

A. I would still say that.

Q. (Continuing) —and despite the fact he was shown to have been selected as emissary to employ Dr. Burns and Dr. Clark in writing up the defense of the basing point system for The Cement Institute—

A. When were they employed for that purpose?

Q. It is August and September, 1934, according to the record.

A. That wasn't why they were employed, in the first instance.

Q. Why were they employed?

A. To make a study of the cement marketing practices.

Q. For what purpose?

34738 A. For the guidance of the cement industry.

Q. And not to educate the public on what the leaders in the industry thought they were doing?

A. No, that was not the object of that. The study was made just the same as you would go out and hire a surveyor to make a survey.

This was done in the cement industry just to see what was going on in the marketing situation.

Q. Despite your feeling towards Mr. Treanor, and about the letter he wrote, he was entrusted with this duty and task of having this work done for the entire—

A. That is your testimony; not mine. I don't know whether he was or not. I wasn't on that committee.

Q. If the record shows that to be the fact—

A. Then your testimony would probably be correct.

Q. Mr. Leisure questioned you about a meeting you had with some thirty other representatives of the cement industry in Washington at a luncheon following a conference you and those leaders in the industry had with Secretary Lamont of the Commerce Department; do you recall?

A. Yes, he questioned me about that.

Q. And you explained that at this luncheon a committee was nominated and elected for the purpose of studying the effect of the Lehigh plan of marketing as adopted November 10, 1930?

31739 A. I don't think that was my testimony. I said a committee was appointed after I left the meeting. I didn't say it was for that purpose. I didn't know any purpose.

Q. For what purpose were you informed it was nominated and elected?

A. To see what they could do about the confusion existing in the cement industry. The Lehigh Dealer Service Plan was going and a number of companies were not following it.

Q. Were you—what did you understand it hoped to do about the confusion?

A. I didn't think enough of it to accept a place on the committee.

Q. Part of the confusion that was prevalent was that of some manufacturers following the plan and others not following it, and others following it in modified form; is that correct?

A. I don't know what other people were doing. I know what our company did. I know our company wouldn't follow it.

Q. A great number did follow it?

A. A great number did.

Q. And a great number of them followed it in modified form?

A. Well, my own opinion was they were all following it in modified form.

31740 Q. You say they brought about the confusion that you referred to?

A. Yes, I would say that brought about the a great deal of the confusion. That wasn't all, but I imagine it contributed greatly to it.

Q. It was your understanding this committee was nom-

inated and elected—this meeting in December, 1930, was—to deal with the confusion?

A. That was my understanding of its purpose—to deal with the confusion, try to figure out what was wrong with the situation. I didn't take a place on the committee, and don't know what they did.

Q. Commission's Exhibit in evidence is in the form of a letter from you to your president, Mr. Struckmann, under date of December 12, 1930, describing that meeting, names the names of the people that were named as members of that committee, and in that letter, you named Brown.

Were you referring to Mr. G. S. Brown of the Alpha Company?

A. I imagine I was. I would have to see the letter.

Q. Do you know whether Brown was—do you know of any other Brown?

A. No, that is why I say I imagine it was. I know of no other Brown.

Q. Do you know of any other Brown present at 34741 the meeting in Washington, than Mr. G. S. Brown?

A. No, I don't recall.

Q. How long after you wrote this letter, December 12, 1930, to Mr. Struckmann, describing the meeting that you decided not to serve on the committee?

A. Well, my recollection of that is—the dates don't aid me in recalling the events beyond that. It happened about that time, December '30—whether the twelfth or thirteenth, I couldn't tell you, but my recollection is I was told the day after or two days after the meeting in Washington a committee was appointed, and I was expected to serve on it, or was going to be asked to serve on it, and I immediately told them I wouldn't serve.

It was very shortly after that.

Q. Would you say five days?

A. I would say two or three days after the meeting.

Q. Did you receive any report of the committee meetings?

A. I don't know that they ever held a meeting. I don't know what they did beyond my refusing to take a place.

Q. Do you know who was selected to replace you on the committee?

A. I haven't any idea; the committee—I don't know whether the committee ever did anything. I have no knowledge of it. I have no idea that they did anything.

Q. You just refused to serve?

34742 A. I refused to serve and have nothing to do with it.

Q. Who asked you to serve on the committee in the first instance?

A. I have forgotten.

Q. Mr.

A. My recollection was they came to the office and talked to the then chairman of the Board, Mr. Bissell and myself, but it sticks in my memory, Frank Smith, the late president of the Lawrence Portland Cement Company, is the one who it was, but I am not sure.

Q. He was a member, according to the letter.

A. It sticks in my mind he was the man that came to my office.

Q. You don't recall the other gentleman that came along with him?

A. No, I haven't any recollection.

Q. Who was president of the Cement Institute at that time?

A. When was that? What year was that, 1930?

Q. December 1930.

A. I don't know. We were out of the Institute and I don't know who was president. We were not members at that time.

Q. And you resigned for the reasons you gave Mr. Leisure on direct?

A. Yes.

Q. You told Mr. Leisure you never submitted—

34743 or I believe you stated in response to one of his Honor's questions—you never submitted trade practice application—application for trade practice conference to the Federal Trade Commission.

I will ask you if one of the reasons, or if the reason you did not submit it was because of advice from Colonel Donovan, the counsel for the Cement Institute at that time?

A. I believe I testified one of the reasons we didn't submit it was because of the attitude of whatever body it was, the Federal Trade Commission or Department of Commerce, had appeared to change and grow cold towards Trade Practice Conferences, and then counsel agreed that it was not the opportune time to go down and present our request for a Trade Practice Conference under the conditions.

Trial Examiner Norwood: What time was that?

The Witness: That was in 1930; rather continuous performance all during the time we were in the Institute. Kept up demands for it.

By Mr. MacIntyre:

Q. So, following out that suggestion, and advice, you never presented the application?

A. As far as I know it was never presented. We got out in September, 1930, and as far as I know, it was never presented.

34744 Q. Except in so far as the copies of the Code of Ethics and evidence of other activities of the Institute have been picked up by investigators for the Federal Trade Commission, do you know of it having ever been of the activities ever having been called to the attention of the Federal Trade Commission by any member of the Institute?

A. I have no knowledge of whether it was.

Q. You stated one of the reasons you joined the Cement Institute was to secure statistics?

A. Yes.

Q. On the cement industry. Were you not already subscribing to distribution of statistics by Mr. W. S. Mallory?

A. We had taken statistics from Mr. Mallory during that period, but they amounted to nothing. We wanted to get complete statistics on operations and other things in this eastern district, and get them promptly.

That's why we wanted to get in the Institute.

Q. When you got into the Institute you continued to get them from Mr. Mallory?

A. I don't recall whether he continued to furnish them. His information was never complete and never amounted to anything, and consequently, we never paid much attention to it.

I don't recall whether we were paying him or not. I don't know whether we would have paid him after

34745 getting into the Institute?

Q. Isn't it a fact the Cement Institute did not furnish you statistics of production and statistics of operation until after Mr. Mallory became its statistician in 1933, at which time he ceased to send them direct?

A. No, I think the office over there, the Cement Institute office was supposed to have been furnishing them, but

they never came around and were never of any value to anybody, and that is one of the reasons the Cement Institute could not survive.

The information was not furnished by the members—it wasn't available then from the members.

Q. What use would you—what use do you make of the statistics of the Cement Institute that is different from the use that you make of the statistics that you receive from the United States Bureau of Mines?

A. At the present time there is not a great deal of difference in them.

It was during the Code days when the Cement Institute was a strong and vigorous organization that we could get them more quickly from the Institute than from the Bureau of Mines, probably thirty days earlier.

But at the present time, there is nothing in them. It is a recapitulation or recompilation of what is in the Bureau of Mines' statistics.

34746 Q. The Cement Institute does inform you what your competitors are shipping and the Bureau of Mines does not; is that a cardinal difference?

A. That is a difference. I never see that statement, but I believe such statement comes out. Cement companies are not shown by names, but by symbols. I have never—I never see such a statement.

Q. But you, of course, knew the code numbers or symbols and were enabled to determine just to which company that information applied?

A. I couldn't have told you the code numbers. But it's probable the men in our organization do know.

Q. Can you tell us, Mr. Hogan, what was the nature of the statistics of the Cement Institute furnished you during the years 1929, 1930, and up until 1933, at which time Mr. Mallory was preparing and sending out to his subscribers statistics on production and shipments?

A. Mr. MacIntyre, we were not a member of Cement Institute until January, 1930, and we got out of it in September 1930.

There was no information we ever got from them outside that period, as I have testified.

Members were not supplying the statistics to the Institute and it wasn't complete, and they didn't get out reports with any regularity.

The only information we got was when we sub-
34747 scribed to the freight rate book which was 1932.

I'm not sure of that, but I think that was the time. That is the only information.

Q. One of the services you got in this period, in 1930, was information as to contract checking?

A. Oh, yes, that was part of the service.

Q. You had statistics on contracts set up by competitors?

A. Contracts filed with them.

Q. And letting you know how they were going.

A. The object in checking those contracts was not to let us know how anything was going, but to eliminate duplications and false contracts, things of that kind, was the object of that.

Q. Reverting to this question of trucking, you stated on direct examination fifteen cents per barrel charge was placed on truck shipments because of certain factors.

Will you please explain that a little more?

A. I said I think the question there was the intention of curtailing trucking, and I think I testified it was put on their principally to compensate for the additional expenses and for the nuisances, and one thing or another, trucking caused us, and it also added to the expense.

I think that was my testimony.

Q. Is it your opinion, Mr. Hogan, that any added ex-
penses, if any, for the loading of trucks at your
34748 plants and the plants of your competitors equal exactly fifteen cents per barrel in all cases, whether loaded at your plants or loaded at the plants of your competitors?

A. I don't know what it would be at our competitors. I would think at our plant it would not equal fifteen cents a barrel. That would probably be an arbitrary price.

What it would run one day, it wouldn't run the next. It may be high or low.

Q. Nevertheless, you placed fifteen cents per barrel loading charge.

A. That is like everything else a competitor does in the cement industry.

Q. If the cost was eleven cents per barrel and you didn't put but eleven cents on to cover that, you would be ahead of your competitor?

A. No. They probably would not have put on but eleven cents, either.

Q. You did it because your competitors did it?

A. No, not exactly. We wanted to be compensated for the nuisances and for the expenses of doing that job.

Q. Wasn't one of the nuisances of trucking that of making it difficult to compute delivered prices quotations of your competitors?

A. No.

Q. And considering and making them the same?

34749 A. No. Trucking never affected a very wide area.

Didn't affect us over a very wide area. Where we did truck, it was generally within an area where we knew what the prices of cement were, regardless of the truckers or what they did.

Where we were trucking, they could come and get it.

Trial Examiner Norwood: You mean where you truck it, it was seldom necessary to figure the price?

The Witness: Yes, they came and got the cement.

By Mr. MacIntyre:

Q. Calling your attention, Mr. Hogan, to your answer appearing at Line 1, Page 34599, I will ask you to explain that please. (Indicating.)

A. This is my testimony?

Q. Your testimony of yesterday afternoon.

A. Where is it?

Q. You have stated, as I understand it there, a rigid f. o. b. mill price would vary according to quantity shipped. Will you please explain that statement?

(Counsel hands transcript to witness for examination.)

A. (Witness examines transcript.) What lines do you want explained?

Q. Line 1. Your answer on Line 1, in which you said—

A. Well, I stated it can vary in quantities and

34750 things of that kind. I had in mind the Robinson-Patman Act that let you take a different price for volume.

Trial Examiner Norwood: Read that answer.

(The answer referred to was read by the reporter.)

By Mr. MacIntyre:

Q. Now, Mr. Hogan, I also call your attention to your answer appearing at Lines 15 and 16 on the same page,

34599: Please explain what you meant by the words on the page, "I am talking about the way we opened it up."

What were you referring to there?

A. I think that is—must be a mistake. It must be a mistake. Doesn't seem to have any relation to anything else there at all.

Q. I didn't think so. I wanted to know what you meant.

A. I don't understand that. The Examiner was questioning about the f. o. b. mill selling. That answer drops in there—that I am talking about the way we opened it up. Doesn't make any sense.

Trial Examiner Norwood: It was an answer to one of my questions, you say?

The Witness: You said go ahead. I was describing the competition of f. o. b. mill selling.

Trial Examiner Norwood: Yes.

The Witness: And you asked me to go ahead, and then that thing—I am talking about the way we opened
34751 it up—doesn't make sense.

By Mr. MacIntyre:

Q. You don't think the answer as it appears there should be there?

A. No, I don't think so. It doesn't appear to make any sense.

Mr. MacIntyre: That is all.

Trial Examiner Norwood: Redirect.

Redirect Examination by Mr. Leisure.

Q. Just one point to clarify something you said on cross-examination, Mr. Hogan.

You used the phraseology "dog eats dog policy," and "some mills would have to go out of existence."

You were there discussing with Mr. MacIntyre, a flat mill price.

I would just like to know what you meant by that expression, whether you meant there would or would not be more competition?

A. Yes. I think that is not a complete statement. I think it was in relation to the Lehigh Valley situation that he asked that question.

What would be the effect on the mill? I said, it would be a "dog eat dog policy."

They would go in and try to get an advantage
34752 over each other until it got to such a low level they would all be in a bad fix.

Q. What I wanted to get clear, was what you meant. Did you or did you not mean there would be more or less competition in a restricted area?

A. I think that when the f. o. b. mill selling went into the area for the first time, there would be very active competition until the process of elimination worked itself out.

Q. And did you mean there would be more or less competition in a broader territory?

A. No, I mean in the use of that term, they would all try to get advantages and all try to get all of the business. That is what I meant by dog eat dog policy.

Q. As to the broader territory, I am asking whether there would be more or less competition in the broader territory?

A. There would be less, so long as the other mills in competing territories didn't go to the level of prices that would offset what they were doing in the Lehigh Valley.

Q. Do you mean there would be more or less?

A. Less.

Q. In the broader territory?

A. Yes. Until such time as the mills in the outlying territories would lower their f. o. b. prices to offset what they were doing in that territory.

34753 Q. What I am not clear about, Mr. Hogan, is that you have already said that competition would not permit a mill to adopt a uniform mill price, or method, and it could not adopt it unless the other mills were forced to go to the same method by law.

A. Yes.

Q. Or some arbitrary means, is that correct?

A. That is correct.

Q. Did you assume, when you were talking to Mr. MacIntyre on this subject—

Trial Examiner Norwood: I don't think that counsel should lead the witness on redirect.

Mr. MacIntyre: The witness has answered the question anyway.

Mr. Leisure: I will try not to lead him in any way.

By Mr. Leisure:

Q. Did you assume those conditions in answering Mr.

MacIntyre's question, or did you not assume those considerations?

A. In answering Mr. MacIntyre's question, as I recall it, the part of the Lehigh Valley situation, I was assuming an f. o. b. mill price, general f. o. b. mill price, that was—that resulted in a dog eat dog or cut throat competition, whatever phrase you want to use, policy there.

Unless I have got that mixed up with some other
34754 set of questions, that is where I had it placed in your questions.

Is that right?

Q. I was merely trying to get clear what you meant by that phraseology and whether or not you had that in mind in your cross-examination.

That's what I am trying to get straightened out.

A. I would put it another way. There would be severe competitive conditions with prices going lower and lower until somebody, because of exhaustion or running out of cash, would have to be eliminated.

It all relates to that.

Q. Would that or would that not apply where there was more than one mill in a locality?

A. No. I had that localized in the Lehigh Valley where a great many mills are in a restricted area.

Mr. Leisure: That is all.

By Trial Examiner Norwood:

Q. I neglected to ask you a question there with respect to this map, Respondents' Exhibit No. 2460.

Under the conditions assumed when you gave your testimony there, would you have a monopoly in those green areas around the various mills?

A. Yes. That is, in four of them, your Honor,
34755 Norfolk, Limedale, Spocari, Alabama, and Louisiana.

Q. I want to know to what extent that will be a monopoly?

A. Well, it would be a monopoly, a strong monopoly in this district here, (Indicating Norfolk). Also in the District of Columbia, and a strong monoply in there (indicating Spocari) and the same in New Orleans. It would not be so strong in here (indicating Limedale) because the advantage is not so great.

Q. The monopoly would depend on the price?

A. Yes.

Q. The lower you made your price, the greater would be the monopoly?

A. Yes.

Q. But when you raised it up to where the competitor could ship in and meet it, why your monopoly will cease?

A. If he could ship in.

Q. There would be a limit beyond which the monopoly could not be maintained?

A. Oh, surely.

34757 BENJAMIN F. AFFLECK was recalled to the stand as a witness for the Respondents, and, having been previously duly sworn, testified as follows:

Trial Examiner Norwood: Please state your full name for the record.

The Witness: Benjamin F. Affleck.

34758 *Direct Examination by Mr. Hershberger:*

Q. You are the same Mr. Affleck who testified before that he had been the president of the Universal Atlas Cement Company?

A. Yes.

Q. Until 1936?

A. Yes.

Q. September 1, I believe. I would like to have you state, Mr. Affleck, who the directors of the Universal Atlas Cement Company are at the present time, if you know.

A. Blaine Smith is the president of the company; Fred Stone; Oscar Lindahl.

Q. Mr. Stone is vice president?

A. Vice President. Oscar Lindahl is coinptroller; K. K. Knapp is general counsel, and myself.

Q. Those are all of the directors of the Universal Atlas Cement Company?

A. Five?

Q. Yes.

A. Yes.

Q. Are any of the directors of the Universal Atlas officers or directors of the United States Steel Corporation?

A. They are not.

Q. I think you testified before, did you not, that your company has nine plants, and if you will permit me, 34759 I will state them in order that we may have something here to proceed from.

A. Nine plants.

Q. The original plants being the Universal, Pennsylvania, plant, commonly called, "Pittsburgh," and at Buffington, Indiana—a suburb of Chicago—Duluth, Minnesota—

A. Yes.

Q. And the additional six plants being in Hudson, New York,—

A. Yes.

Q. Northampton, Massachusetts—

A. Pennsylvania.

Q. Northampton, Pennsylvania. I should say Pennsylvania. Birmingham, Alabama—

A. Just south of Birmingham, Leeds.

Q. Leeds. It is not a few miles from Birmingham. Hannibal, Missouri?

A. Yes.

Q. Independence, Kansas?

A. Yes.

Q. And Waco, Texas?

A. Yes.

Q. Universal-Atlas Cement Company is a corporation of what state?

A. Indiana.

Q. And when was it organized?

34760 A. October 1, 1906.

Q. Was it then called by its present name?

A. The original name was Universal Portland Cement Company.

Q. And when did it change its name as it is, if it changed it?

A. First of January, 1930.

Q. Changed its name—

A. Changed its name to Universal Atlas Cement Company.

Q. That wasn't a merger or change of corporate structure?

A. No, it was not a change of corporate structure. It was merely a change in the name of the corporation.

Q. What was the occasion for the change in the name?

A. The occasion for the change of the name was that the Atlas plant had been acquired, and by changing the name it made the title conform to the territory covered.

Q. You mean by that the six plants which I just named?

A. Yes.

Q. Had formerly been owned by Atlas Portland Cement Company?

A. Had formerly been owned by Atlas Portland Cement Company.

Q. There was no corporate relationship between Atlas Portland Cement Company and Universal Portland Cement Company?

A. No, none at all.

Q. And there was none after the acquisition of these plants, was there?

A. No, not at all.

3761 Q. This acquisition did not not result in a merger or taking over of a franchise from Atlas Portland Cement Company?

A. No, not all. It remained it was a purchase of the assets and assumption of the Atlas Company's liabilities.

Q. I want to develop this very quickly. It is merely background.

Trial Examiner Norwood: You acquired all the good will and business?

The Witness: Yes, yes. Assets and liabilities were taken over.

By Mr. Hershberger:

Q. Let me bring out just one other point on that question so that we will have it clear.

The Universal Portland Cement Company did not buy the assets of the Atlas Portland Cement Company?

A. No.

Q. Just state what the process was?

A. The process was this: The United States Steel Corporation bought the assets of the Atlas Portland Cement Company, paid for them with common stock in United States Steel Corporation; and then the Universal Atlas Cement Company under its new name acquired those assets from the United States Steel Corporation.

Q. Now, in addition to the New York office, you

3762 maintain offices at each of the plants I have named?

A. Yes.

Q. In addition to those places, you have offices at various locations?

A. Yes. Sales offices.

Q. St. Louis, and various other cities? I think perhaps it has been stated in the record some time before. I won't go into that at particular length.

You have offices, for example, in New York?

A. Yes.

Q. Does the Universal Atlas Cement Company have any subsidiary companies?

A. It has one. The Atlas Lumnite Cement Company.

Q. Is it called the Atlas—

A. The Atlas Lumnite Cement Company. I think that is the title.

Q. Roughly speaking, the capacity of the Universal Atlas Cement Company, when you were still its president, was something around thirty million, or slightly over thirty million barrels; is that right?

A. Something over that amount would be about right.

Q. I would like to have you explain to the Trial Examiner, what the reason was that you acquired the plants of the Atlas Portland Cement Company in the early part of 1930, through the United States Steel Corporation in the way you have indicated?

34703 A. During the '20's things were going along fine. The Universal Portland Cement Company, with its three plants at Chicago, Pittsburgh, and Duluth, found its territory somewhat limited to the territory that could be reached at a reasonable rate of freight, or a certain minimum rate of freight—certain maximum rate.

And it seemed to me desirable to spread out and expand our territory by the acquisition of the Atlas plants—which that acquisition permitted us to do, their six plants being remote from ours and serving pretty largely a different territory with only a very small amount of overlapping.

Q. You mean by that there was no substantial competition prior to your acquisition between the three plants which you then had and the plants you then acquired?

A. No substantial competition. There was some, of course.

Q. On the fringe of your territories?

A. Amounted to very little. The nearest Atlas plant to our Chicago plant or to any of our plants was the Han-

nibal plant, about two hundred and eighty miles from Chicago.

Mr. Hershberger: I would like to call your attention to the fact that an exhibit in this record—I can't give you the number—perhaps Mr. Wooden or Mr. MacIntyre can tell me the number—but it is the price basis in [illegible] quiry—basing point formula and cement prices, March, 1932, being the pamphlet of the Federal Trade Commission which has been put in evidence.

Can you tell me what the—

Mr. Wooden: That never was put in evidence. I would not have thought of offering such a thing.

Mr. Hershberger: I thought it had been offered in evidence at one time. All right.

Mr. Wooden: Never thought of such a thing.

Mr. Hershberger: You are sure of that?

Mr. Wooden: Sure.

Mr. Hershberger: Off the record.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Hershberger:

Q. Mr. Affleck, in connection with the acquisition of the Atlas plants, was one of the consideration—did you or did you not have as a consideration attaining a more dominant position in the industry with respect to pricing methods than you had theretofore enjoyed?

A. Not at all. Our position in the industry was not changed. The pricing methods or selling methods were not changed in any respect, that I can remember.

34765 Q. Would you say the acquisition of the Atlas six plants affected, in any way, the methods under which you were selling cement?

A. Not at all.

Q. In so far as the use of what is sometimes called or what has been called the basing point system, or the delivered method of selling cement—

A. No.

Q. Did it have any effect in that respect, whatever?

A. No, no change in any respects.

Q. Would you say there was or was not, as one of the considerations in acquiring those plants, a desire to assert your company's position as a price leader more than it could—

A. Not at all.

Q. Assert before that time?

A. We had no more leadership after we acquired the Atlas than we had before. The Atlas had certain business in its territory where it operated, and we had certain business in the territory where the Old Universal plants operated.

And changing, or putting them together, didn't change the position of leadership in any respect.

Q. Are there any other considerations you can think of that impelled the acquisition of the Atlas plants, that you have not mentioned?

34766 A. Hope and desire for profits, of course. That is implied, I think, in my previous answer; which I may say off the record, was not realized.

Q. I would like to talk with you for a moment, Mr. Affleck, about your membership in the Cement Institute.

You know, do you not, the time or about the time the Cement Institute was organized?

If you do, please state.

A. The Cement Institute, if I remember correctly, was organized in 1929.

Q. Yes. Were you a member at that time?

A. We were not.

Q. Were you a charter member?

A. No.

Q. When did your company, the Universal-Atlas Cement Company, or Universal Portland Cement Company—

A. Universal-Atlas.

Q. Universal-Atlas, at all times, since this—

A. We joined in the late spring or summer of 1933, when the N. I. R. A. was either pending or had just been enacted.

Q. That was in connection with the selection of a Code Authority?

A. Yes.

Q. And the preparation of a Code?

A. Adoption of a code, yes.

34767 Q. Prior to that time, had you given any consideration to joining the Institute at any time prior to the N. R. A.?

A. Yes.

Q. When was that?

A. When we acquired the Atlas plants and got into the

Atlas situation, we found, of course, that the Atlas Portland Cement Company had been a member of the Cement Institute. That we did not continue that membership, however, having assumed the liabilities of the Atlas Portland Cement Company with their assets we found we had assumed an obligation to pay an amount—I forget what it was—in the form of dues.

The by-laws requiring a member resigning to pay dues for a period in the future; I think a year's time; so we had to pay that but we did not at that time join the Cement Institute.

Q. And you had that up as a matter of fact—

A. We had that up.

Q. And considered it with various officials and determined not to join?

A. We had that up with the United Steel Corporation officials and they advised, or instructed us to not join the Cement Institute.

Q. Do you recall about when that was?

A. Oh, I think that was very early in January.

34768 Q. 1930?

A. 1930, yes.

Q. Right after you acquired these Atlas properties?

A. Yes.

Q. In order to fix the date you made the application to join the Institute, I will hand you an exhibit which has been put into the record as Exhibit 2173-A to E. Respondents' Exhibits, which purport to be, if I may just read here, I think it is short, minutes of the Cement Institute on June 15, 1933, and I believe purports to show a number of companies making application on that date to join the Cement Institute, and I call your attention to the name of the Universal Atlas Cement Company at that point.

A. Yes.

Q. Does that refresh your recollection that was the time on which you first made application to join the Cement Institute?

A. I think that is correct. Yes, June 15.

Q. 1933. Do you know anything about the Code of Ethics which the Cement Institute had had—from the time of its inception up until the time you joined the Institute?

A. I knew nothing about that. I don't think I ever saw that document when the N. I. R. A. was pending, after

it was enacted, about that time the Code of Ethics
34769 which had existed prior to that time was abandoned
and a new Code was—

Q. I hand you what is Federal Trade Commission's—

A. We were never parties or signatories of the so-called Code of Ethics, never having been members.

Q. I hand you Commission's Exhibit 138-A to 1 and ask you if that is the document which you are referring to as being the document which was abandoned or cancelled, whatever word you used to indicate it had been eliminated by the Cement Institute?

A. Your question is whether I can identify this as the—

Q. Yes. Is that a copy?

A. I don't know. I never was—I don't remember is this form or is this a typewritten copy of a printed—

Q. That is a typewritten copy.

A. I don't remember ever seeing this, Mr. Hershberger.

Q. All right.

A. I had no special interest in it. I don't say that I didn't see it. I probably did see it, but I have no recollection.

Trial Examiner Norwood: Are you speaking of both branches of your company?

The Witness: No; I am speaking of the Universal Portland Cement Company because this was in effect—or
34770 of both, yes. We were not members of the Cement Institute during the period from 1929 until June, 1933, or May, 1933, when this was in effect.

I had no special interest in it.

Trial Examiner Norwood: You are speaking of the new company after it acquired these companies?

Mr. Hershberger: Yes, or both companies, because as a matter of fact, I think he stated Universal Atlas name was acquired in 1930, and he testified, I think perhaps there is a little—

By Mr. Hershberger:

Q. What you said about Universal Atlas not being a member of the Cement Institute applies as well when the company was the Universal Portland Cement Company?

A. Yes.

Mr. Hershberger: Does that clear up what you had in mind?

By Mr. Hershberger:

Q. As a matter of fact, Mr. Affleck, the action which

you referred to of cancelling this original Code of Ethics was taken at an adjourned meeting of the Cement Institute held June 16, being the same meeting at which you presented your application to join; is that not true?

If you will look at the last page of this, I think you will find some indication that is the case.

A. Adjourned meeting.

34771 A. Yes.

A. June 16. Motion duly made seconded and carried that the present Code of Ethics of the Cement Institute be cancelled?

Q. Yes. So that, at no time, did your company under either the name Universal Portland Cement Company, or under its later name Universal-Atlas Cement Company, subscribe to the original Code of Ethics of the Cement Institute, and that Code of Ethics was eliminated from the Institute at the time you joined the Institute?

A. Correct.

Q. There is an exhibit in the record, 136-A, Federal Trade Commission's Exhibit, which indicates that one of the employees of the Universal-Atlas Cement Company, a man by the name of Kelley, and I believe a man named Bartlett, had been present at an early Cement Institute meeting in 1929, and another Federal Trade Commission Exhibit No. 1361-EE, which indicates Fred Stone and Mr. McFarland had been present at another early Institute meeting in Chicago, January, 1930.

I will ask you, whether those men had attended those meetings by your authority or not?

A. Certainly not.

One was in 1929?

Q. One was late in 1929 and the other in January, 1930, I think.

34772 A. Mr. Kelley was our—

Q. I don't have the time in 1929. I think in September, possibly.

A. Mr. Kelley was sales manager of Universal Portland in New York.

Mr. Bartlett was associated with the company, and it is quite conceivable they were invited to sit in at the meeting. I don't know whether they asked any approval of me as to whether they could go or not, but it could be quite natural for them to sit in and be present, but have no authority to represent the company in any respect.

Q. Who is Mr. McFarland?

A. Mr. McFarland; that is, the later meeting?

Q. In January 1930?

A. January. McFarland had been a vice president of the Atlas Portland Cement Company and he continued on with us for a while.

That meeting, you said, was in Chicago?

Q. Yes.

A. And there again, it is quite natural—I think I was in New York at that time. I was here a good deal of the time during the early weeks of 1930. Quite natural he might have received an invitation to sit in at this meeting of the Cement Institute, but in no sense did he represent the company.

34773 Q. Do you know of any other meeting in which any of the officials of your company attended—attended any of the Cement Institute meetings prior to your belonging to it?

A. I don't know.

Q. You don't know?

A. Don't know of any.

Q. You don't know of any activity in which members of your company took part during the period before you joined?

A. No.

Q. I think that is sufficient.

I would like to talk to you a moment about the compendium of established terms, and which was marked as Federal Trade Commission's Exhibit 561.

Do you recall some meetings of the so-called Trade Practice Committee of the Cement Institute in the summer of 1935, that had to do with a compendium?

34774 A. Yes.

Q. Perhaps you can't remember dates, but could you just tell us what you know about any such meeting or meetings?

A. After the N. I. R. A. was declared unconstitutional, there was a period of considerable confusion and chaos, and there was a committee they called the Trade Practice Committee to see what they could do to straighten the thing out.

I think it was a meeting in Chicago in the fall or late summer.

Q. Would July 9 be about the date? I have the document here I can show you.

A. That is probably about right.

Q. Were you present?

A. If you have the minutes there, and if it shows I was present I would say yes. I don't remember very distinctly. I was probably there.

Q. I think the minutes indicate you were there. Perhaps reading the minutes as to the names of those present might—

A. The following were present: Affleck—yes, I was there July 9.

Q. Now, do you recall at that meeting there was some discussion of some trade practice rules, so-called—trade practice rules?

34775 A. Yes, that's what the meeting was for.

Q. And just in a very general way, what was done at that meeting, if anything, about it?

A. Well, as I—was Mr. McFadden there?—

Q. Yes, I think—

A. I think Mr. McFadden and Mr. Reiter undertook to or were instructed to compile something in the way of a trade practice procedure.

Q. And then did the meeting—

A. There was a great deal of conversation across the table. A couple of dozen men were present.

Q. Of course, this was the time when conditions were very much confused?

A. Very much confused. And we got the impression from Washington if was desired that conditions be continued so far as possible and legal that had been brought about by the N. R. A.

Q. Of course you are referring to certain statements made by people in the administration?

A. Yes.

Q. Was anything definite done at that July 9 meeting about a compendium of trade practice rules?

A. I think it was put off until a later date. The word "compendium" didn't appear in that meeting, as far as I remember.

34776 Q. You had a later meeting in Denver?

A. Denver, Colorado.

Q. Denver, Colorado. And do you recall about when that was?

A. Oh, two or three weeks later. A month later.

Q. Would August 6 or 7 be about right?

A. That's all right.

Q. And can you recall being present at that meeting?

A. Yes, I was there.

Q. And without handing you this document to refresh your recollection, state what you can about any further documents of trade practice rule or compendium at that meeting?

A. I think the trade practice rules that had been worked out by Mr. Reiter and others, perhaps were read and discussed and no action taken.

But in lieu of action on the trade practice rules, which had been worked on for months, Mr. Sunderland submitted a statement of, or a document that might be called a substitute—

Q. That is—

A. —To which the name compendium was applied.

Q. That is the Mr. Sunderland, head of the Ashgrove Company, is he not?

A. Yes.

Q. Do you recall about—do you recall what was 34771 done about the compendium at that time?

A. Well, that is five years ago. I do not remember it very distinctly, but I think that was referred to a committee for study or for submission to the industry, something of that sort. I don't remember—it wasn't adopted, and because I don't think that meeting was competent to adopt anything.

Q. Was anything—any understanding or agreement at that meeting, that those who were present and who were favorably disposed toward this compendium would be bound by its terms?

A. No, not at all.

Q. Was there any discussion along that line?

A. I don't think so. This compendium, if I may talk—

Q. Yes, go ahead.

A. The trade practice document, or this compendium as I remember it, both of them were merely a statement at some length of the practices that had prevailed in the industry, or at least with most companies in the industry for a long time before.

There wasn't anything new in the trade practice or the compendium, to our company, and although I attended the meeting it didn't affect us because it wasn't any different from what we had found after long, long exper-

jence would be good sound, fair, ethical practice,
34778 which we had followed.

Q. As a matter of fact, you were not a member of the Trade Practice Committee, were you, do you recall?

A. I don't remember.

Q. Do you recall whether at some subsequent time the compendium was, after some changes, sent to the Board of Trustees of the Institute to have their attention, do you recall that?

A. I think it was.

Q. And do you know what they did with it?

A. I don't know.

Q. Well, there are exhibits in the record which indicate what action was taken, and I don't think it is important to call that to your attention.

A. I was probably familiar with what was done at the time, but I don't remember now.

Q. You said a while ago, this compendium was at least in the large part, in practice—you had observed those practices.

I would like to read you some paragraphs from this compendium, without having them in the record, because I don't think there is any use copying them in the record, because they are in the exhibit.

But I would like to read them and ask you if, with reference to those paragraphs, they were something new
34779 or something you had been carrying on for a long time.

Trial Examiner Norwood: Can't you give it to him and refer to it by paragraphs and save putting it in the record?

Mr. Hershberger: Yes.

Trial Examiner Norwood: Refer to the page and the paragraph.

Mr. Hershberger: I refer to Article 2, Section 1.

Mr. MacIntyre: Off the record.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Hershberger: Let the record show the document which has been handed to the witness is F. T. C. Exhibit 561.

By Mr. Hershberger:

Q. Referring to Article 2, Section 1, which refers to the packaging in bulk and in sacks, weight, and so forth,—

read that to us and then—no, read it to yourself, and then state whether that stated a practice which was new or a practice that had been engaged in by your company before, and if before, how long before?

A. Section 1-A and B.

Q. Article 2, Section 1-A and B.

A. (Witness reads document.) Those provisions
34789 had been in effect substantially for thirty or thirty-five years prior to this time, or forty years.

Q. In other words, that does not state any change?

A. Nothing new.

Q. Nothing new. How about the next section?

A. 2. (Reading.) That practice has been followed for quite a while, or if not exactly this practice, substantially this practice.

Q. What do those practices refer to, in few words?

A. The fifteen days, I think, perhaps they have been some ten days or twenty days or thirty days, something like that. May have been slightly changed.

Trial Examiner Norwood: Fifteen days for what?

The Witness: From the date of the quotation.

Trial Examiner Norwood: That is for—

The Witness: From the time the order is taken. The order is taken and it is for shipment in fifteen days, not beyond fifteen days.

That practice has been in effect for—I don't know ten or fifteen years.

By Mr. Hershberger:

Q. When you say it had been in effect, you mean your company had followed it?

A. Our company had followed it, yes.

Q. And that was your understanding, it was a
34781 general practice in the industry?

A. Yes, I think it was.

Q. How about Article 2, Section 3?

A. That was an old practice.

Q. You mean by that, including—you mean antedating even the time—

A. Yes.

Q. In which the Cement Institute was organized?

A. Well, about the same time.

Q. What do you mean about the same time?

A. Anybody could buy all the cement he wanted for delivery in fifteen days, which, if you wanted—but if he

wanted it beyond that, we would sell him for a specific work. He had to take it in fifteen days, and the purpose of that, of course, was to prevent speculation.

That was a practice that had been in effect for a long time.

Q. Let me make this suggestion, inasmuch as we are handling the evidence pursuant to the plan suggested by the Trial Examiner.

Mr. Hershberger: Will it meet with your approval, Mr. Examiner, if he would just, in a brief word or two, state what the subject is, because we are discussing something here and it is not quite understandable if—

Trial Examiner Norwood: I think so.

34782 Mr. Hershberger: —it is not explained as we go along.

By Mr. Hershberger:

Q. State briefly—

A. Section 4, Exhibit A and B attached, are forms for specific sales orders.

Q. Don't read the whole thing. Read the last—just read it to yourself, and see what it is.

A. Yes. These forms are in the back here, are they?

Q. Yes. I think you will find those attached as exhibits.

A. Section 4, Article 2, covers, as far as my memory serves me now, a practice that had been in effect for a long time previously.

Q. You had always used forms, of course, for specific sales contracts?

A. Yes, yes, always.

Q. And perhaps there have been some changes in your forms from time to time of various words and phrases, have there not?

A. I remember seeing these forms and then these came out. But while they are worded differently, they are—I remember they are substantially in the same form we had been using.

Q. Take Section 5. Tell us briefly what it is about, and tell us whether that is something new?

34783 A. Section 5, contact for any quarter are quoted on or closed not earlier than the last day of the month of the preceding quarter.

That refers not to business to dealers but business to individuals and companies that make products—concrete blocks and lamp posts.

Q. Is that a new practice?

A. No, that is an old practice.

Q. When you say old, your mean it antedated the S. P. R. A.?

A. Yes, oh, yes.

Q. Has it antedated the period; the time the Gemex Institute was organized in 1950?

A. I think so. A number of years. For a number of years.

Q. Take the next section, please.

A. Where land grants or special freight rates are applicable.

Q. That is a provision requiring you to give full benefits.

A. Members bidding shall quote in such manner as will give the full benefit of land grant or special rates. That practice has been in effect.

Q. Of course, the dispute in this case.

A. Yes, I remember the testimony.

Q. Your testimony is that you had attempted to give the full benefit of land grant rates?

A. We always had and for obvious reasons.

Q. And long before that compendium was written?

A. Yes.

24784 Q. How about Article 3, Section 1. What does that refer to?

A. All specific sales orders and specific sales contracts shall contain, and so forth.

Q. That is the provision for contract forms and it says they shall be definite and not misleading?

A. Refreshing my memory, I am familiar with this, now that I have seen it.

That is merely stating a merchandising practice that applied not only to cement but merchandising, generally, for more, well, for many, many years, generations and centuries back.

The invoice states the quantity and all the different allowances and the weight and price and extension, and so forth.

Q. In other words, there is nothing new?

A. Nothing new there at all.

Q. (Continuing.) Is there that had not been the practice in use by your company?

A. Just a restatement.

Q. For many years? Is that true of Section 2 of Article 3, that has to do with discounts?

A. Well, what I have just said covers that, too. The discount on cement is not the same as on other merchandise. It is higher.

34785 Q. Would have been at times?

A. This discount has been in effect many years, many long years prior to this.

Q. You are talking about the ten cents per barrel cash discount?

A. Yes.

Q. Of course, years ago there were different provisions?

A. Yes. Going back twenty years or so.

Q. But the provision for ten cents cash discount in that paragraph antedated this document by a good many years?

A. By a good many years, yes.

Q. Referring to Paragraph 3, Section 3.

A. That is a rule of practice long in effect before this compendium.

Q. What was that for, very briefly, just a word or two.

A. The price includes the members' published leasing charges for cloth sacks and the charge for paper sacks.

Q. How about Section 4 of Article 3.

A. "Invoices are dated as of date of shipment provided" that paragraph, Mr. Hershberger is somewhat vague.

Well, no. Invoice shall contain full information as to price, quantity, kind of package, terms of payment, place of delivery, and so forth.

Q. You had always done that?

34786 A. That was long established practice. Special unusual conditions. I don't know what that means.

Q. Referring to Article 4, are there a number of sections in that particular paragraph that I haven't asked you about?

A. No.

Q. Then I would like to ask you about these sections. I think there are twenty of them. They state what are considered to be unfair trade practices, I believe.

A. Skipping sections 1 and 2 and 3?

Q. Yes. Let me look at that a moment.

A. Sections 1, 2, and 3, standard specifications.

Q. Yes. Take Article 4, Sections 1, 2, and 3, and read them and state briefly what they are.

A. Section 1 specifies the cement must conform to or comply with standard specifications adopted by so and so. That is old stuff. The seller of the material must furnish material which conforms to the recognized specification for the material.

Q. You say "must"; what did you mean?

A. Can't sell it unless he guarantees it will conform to the specifications.

Q. You don't mean by the word "must" he was under any obligation to other cement companies?

A. Oh, no. No. Members guarantee their industry products to—

34787 Q. Section 2.

A. Section 2.

Q. Of Article 4?

A. And do not guarantee finished work nor are members responsible for the condition of industry products after delivery. Industry products mean concrete block and things. Obviously, we cannot follow our products through and be responsible for what some customer does with them.

Q. Does that state a practice?

A. That is nothing new.

Q. Existing long before?

A. Existing long before.

Q. How about Section 3 of that article 4.

A. Members do not pay or absorb any charges for inspection. That is a very old practice also.

The reasoning is simple. The buyer wants to be sure that the material conforms to specifications, up to requirements, and, too, it is up to him to pay for inspections of the material and testing if he doesn't care to take our word for it.

That is a very old practice.

Q. Had your company followed that practice?

A. Yes, always.

Q. For many years?

A. Yes. Always.

34788 Q. It is the understanding these various practices you testified to were in general effect in the industry?

A. I think so. In fact, I am quite sure.

Q. Referring to Article 5, I think that states twenty subjects which are called unfair trade practices.

stating what they refer to and indicate whether they state a practice which was new at the time this compendium was adopted.

A. Under the heading "Fair trade practices, the following fair trade practices are termed unfair methods of competition: one, offering or assisting—offering to buyers special benefits not published and available to others. That was an established practice.

Q. In other words, you didn't attempt to discriminate prior to the time this compendium was made?

A. No. Attempting to breach an existing contract—

Q. That is No. 2?

A. No. 2. That wasn't new.

Q. You never attempted to—

A. We never did that.

Q. You never attempted to breach an existing contract?

A. Knowingly selling or offering to sell industry products to one with whom another member already has contract.

Q. That is No. 3?

34789 A. No. 3.

Trial Examiner Norwood: You are going into a number of things the Federal Trade Commission would permit you to write into a code today.

Mr. Hershberger: I think so, but I will be through in a moment.

Trial Examiner Norwood: Rules, and so forth.

Mr. Hershberger: I think that is true. I am merely endeavoring to—

Trial Examiner Norwood: There is no use bringing those out here, is there?

Mr. Hershberger: Your Honor, what I am trying to do here is this: this document was introduced in evidence, I think, as one of the significant things in this case to endeavor to show the Cement companies arrived at an understanding and agreement following the Schechter case.

It is my purpose to show, as a matter of fact, everything that was in this document was a practice that had long been engaged in.

There was not a thing in this document that was new, and we are always ready to bring these facts out.

I am almost through with it, if you will bear with me. I am trying to hurry.

The Witness: I will try to be more brief.

34790 The Witness: Section 4: Knowingly withholding information which would result in misleading or inaccuracies in any material particular.

That is an old practice.

Compensating salesmen in any other manner than upon a fixed salary or full time basis.

We have always paid our salesmen on a salary basis.

Paying or offering to pay directly—we had never done that.

And that section refers to an old practice.

Diverting or permitting diversion of shipments—we never permitted that, and—nor did others if they could help it.

Prepaying transportation charges. We had not done that as described in this section.

By Mr. Hershberger:

Q. You are speaking of the time you were presi-
34791 dent of the company?

A. Yes. I always—this goes back to—

Knowingly to ship on a specific sales order contract industry products in the amount—that is an old practice, as far as we are concerned, at least.

Knowingly to ship industry products by any transportation agency which makes payments of or concessions which we have never done that knowingly.

Paying or offering to pay expenses. That is an old practice. Never indulged in that.

Excessive or undignified entertainment. I had always frowned on that, so that is an old practice. Most companies frowned on that as I did.

Selling or offering to sell non-industry products for the reasons stated—I won't read this. That is old. So far as our company is concerned, that is an old practice. This provision was an old practice. Other companies here and there did indulge on occasion in this, perhaps.

Q. Which one are you speaking of?

A. Section 13.

Q. That refers in a brief word to what?

A. Selling or offering to sell non-industry products. We had no other products to sell except industry products. So this didn't affect us and it was old stuff with us.

Following practices—undertaking directly or in-
34792 directly to affect the sale of particular brands of industry products and the announcement—there are a lot of things there.

Q. Anything new in that?

A. Nothing new in that as far as we are concerned, and nothing new as far as any other companies are concerned. Exceptions here and there, of course.

Purchasing directly or indirectly fuel at prices in excess of the market.

We never did that to influence business.

Section 15, defamation of a competitor for the purpose of—we have never done that, and that represents an old and highly desirable procedure, as I see it.

Section 16, selling or offering to sell industry products below cost, for the purpose, and so forth.

With the purpose or effect of injuring a competitor or substantially lessening competition or tending to create a monopoly, or restraint of trade.

We had never done that, and that, I think, I can say represents an old practice.

I think there are exceptions, of course.

Falsely marketing or branding. That is an old practice.

Q. You mean by that you didn't—

A. We did not do it nor did anyone scarcely.

31793 Aiding or abetting another in unfair trade practices. Of course, we did not do that, and that provision is also interfering with an employee of competitor with purpose and or affect of hampering or injuring such competitors' business.

That is highly desirable and represents an old practice.

Furnishing articles by way of a loan, lease, or otherwise.

That is old practice.

Q. Is that all of them?

A. That is all twenty.

Q. In other words, you have examined that compendium carefully paragraph by paragraph and have not found anything in it which you would say was inaugurated or new at the time this document was prepared?

A. That is my understanding of it.

As I remember it and the—at the time of its adoption.

Q. Let me ask you, were you responsible for the preparation of that document or any part of it?

A. In the meeting that—

Q. Yes.

A. Oh, yes, I participated in the conversations around the big table.

31794 Q. Did you come prepared with any written—

A. No, no.

Q. —Document to offer?

A. No, no.

Q. The only part you took in connection with this document at all was in the conversation at the meeting?

A. Yes.

Q. After the document had been presented in a typewritten or printed form of some kind?

A. I am sure I wasn't on any committee or sub-committee appointed to formulate or write that. Of course, Mr. Reiter at that time was—

Q. Mr. Reiter was with the Cement Institute?

A. Mr. Reiter was with the Cement Institute.

Q. What I am trying to ask was Universal-Atlas, as a company, the author of any part of this document?

A. Not at all. Just an interested spectator.

I might say if I'm not out of order, your Honor, that we didn't distribute—our company didn't distribute—we obtained some copies—and am I out of order?

Q. No, that is all right. I would have asked you that question anyway.

A. We didn't distribute this—

Q. Compendium?—

A. Pamphlet, except to a very limited extent. I
31795 think we sent them to our branch offices or some of the vice presidents. Didn't go out to our salesmen at all, as I think the little distribution we made was really a matter of information.

Q. Would you say the distribution was confined to officials at the home office, such as Mr. Stone, the vice president, men like Cronkrite and Rowbrer.

A. I couldn't answer that with any accuracy, but I do know we didn't distribute it.

Q. You didn't send it to the various salesmen?

A. We didn't send it to the salesmen because it didn't represent anything new as far as we were concerned.

Q. Now, Mr. Affleck, when you testified in Chicago on Page 13034 of the record, I believe you said Universal Mills had always been base mills, all of the time—you said they had always been base mills; was that statement entirely accurate?

A. That was not entirely accurate. The Duluth mill which began operation in 1916 was always a base mill, but

the mill at Pittsburgh was not—that was started in 1908, and the capacity doubled in 1912.

The first—at first it was not a base mill. We felt we could get a higher price. I was not president of the company then. I was sales manager. We thought we could get a higher price by using more distant base points, 34796 but when we developed the capacity of the mill to about double, it was obviously too big a load—too big a capacity to base on some distant base point, so that Pittsburgh became a base point around about that time. I don't remember just exactly.

Q. Was that about 1913, would you say?

A. That is about right. I think that additional capacity got into operation—well—and then—

Q. How about Buffington?

A. I am—oh, yes, the same reasoning applies at Buffington. I forget the time when that became a base mill. Naturally, there again, we increased the capacity in Buffington in 1912, and about that time, or shortly afterwards, we made Buffington a base.

We had a price base at Buffington.

Q. In 1916—would that seem about the date? Would that refresh your recollection in any way?

A. I would say that was too late because I became president in February, 1915.

Q. I should have said 1915. I beg your pardon.

A. I am mighty sure when I became president, it became a base.

Prior to that time, I think I was in favor of making having base price at each of our plants.

Q. What date did you say you became president?

34797 A. February, 1915.

Q. Who was the president prior to that time?

A. Edward A. Hagar.

Q. You stated one of the reasons why Pittsburgh became a base mill was because of the enlarging of its capacity. Were there any other features involved?

A. I don't think so. That was sufficient.

Q. Did you have competitors nearby that were selling in the same territory?

A. Oh, yes, more than—I have forgotten how they came in, in what sequence, but in the meantime, we had competition in that territory and it was impossible—

Q. What effect did establishing price base at Universal-Atlas have on competitors, if any?

A. Competitors from the east?

Q. Well, from any direction. Did the establishing of price base at Universal have any effect?

A. I think the record will show we made a lower price of course, but it extended the market in which we had advantage freight-wise as compared with other more distant mills.

Prior to our making Pittsburgh a base point, I think the Lehigh Valley controlled pretty largely the central and to some extent western Pennsylvania.

Q. Would you say you made Pittsburgh a base 34798 point, and established a price base there?

A. That made it less attractive for the Lehigh mills and gave us a better chance to build up our business.

Q. Would you say there were the same considerations or different considerations that led you to establish the price base at Buffington in 1915?

A. Pretty much the same. Prior to that time we had based prices largely on LaSalle's three mills, but with increased output at Buffington, we couldn't hold our market based on LaSalle, plus freight; and we had to resort to—we had to make Buffington the base.

It was an artificial, unnatural, illogical, practice not to have Buffington—

A. A base point. You figured that it was more logical to have each mill have its own price base?

A. Yes.

Q. What consideration did you entertain at the time in connection with what that figure should be you used a price base?

A. Well, over the years, fixing—fixing a price base is something that appears—that is something that happens very seldom, but changing it of course happens oftener.

Q. I am talking of the original fixing.

A. The original fixing is based on what the owner or the manager of the plant thinks can be obtained, the 34799 price at which the products can be marketed, the price base of the price which is made by competitors in the territory where the product is marketed; those factors all come into the situation and determine what the price base shall be when a new mill is started. Some of the new mills don't have a price base.

Q. And later price base changes are influenced—

A. By competition.

Q. Almost entirely by competition.

Trial Examiner Norwood: One at a time. There has been much talking throughout this examination of counsel and witness concurrently.

The Witness: I shouldn't talk when you are talking. Excuse me.

By Mr. Hershberger:

Q. I don't know whether it has been brought out clearly in this record or not, just what is a price base figure. What is it composed of? If you can tell us in a few words, I would like to have you tell us, for example, whether the packaging is included or discount that is allowed, and so forth?

A. When I retired from business, a price base included discount, and I think, generally, it included cloth sacks.

Q. Including, did you mean to say?

A. No, excluding. That was added and then 34800 taken off. I am pretty sure it included the discount.

Q. In other words, the price base was the figure to which—to which the package—

A. To which the package charge was added.

Q. Had not been added?

A. Yes.

Q. Had not been added, but the discount had not been deducted?

A. That's correct.

Q. I think that is correct. During your term as president of the company, Universal Atlas Cement Company covering many years, you had many occasions when you saw competitors, did you not, and were those, at formal and informal meetings, casual and otherwise?

A. Yes.

Q. What did you talk about at those meetings?

A. What did we talk about at those meetings?

Q. With respect to the cement business?

A. Well, after talking about the weather for a minute or two, we talked about the cement business, I think, is the answer to that.

We shed tears on one another's shoulder, when things were going poorly, and we exulted when things were going good.

Q. Did you ever have any restraint at all what-
34801 ever upon the subjects about which you would talk with your competitors?

A. No restraint whatever, except that I tried to avoid, and I think I succeeded in avoiding, discussing the things which by advice of counsel I was not to discuss and which by our experience of being defendants in some indictments in other proceedings in 19—the early '20's—caused us a great deal of trouble.

Q. You refer to the Cement Manufacturers Protective Association, that is?

A. And a group of cases that came up about that time.

Q. And group of associated cases with that case?

A. Several different cases.

Q. Now, for example, the question of what you proposed to charge on future sales, did you discuss that with—

A. No.

Q. —Competitors?

A. No.

Q. Did you discuss with your competitors terms of sale ~~not proposed~~ to use in the future in your sales?

A. No.

34802 Q. I show you Respondents' Exhibits for identification 2463-A, B, and C; 2464-A, B, C, D, and E, and 2465.

A. They are two different memoranda, are they?

Q. Yes. Just look at those so that you know what they are, and then tell us without describing the contents of those documents, tell us what those documents are.

Take No. 2465 first. Tell us what that is.

A. Letter from the president of the United States Steel Corporation to me, dated June 10.

Q. Is that the original letter?

A. That is the original letter?

Q. Do you recognize the signature?

A. Yes.

Q. What year?

A. 1932.

Q. Will you tell us whether the other exhibits, 2463-A, to C, and 2464-A to E, that are attached to that letter—

A. They are documents which accompanied this letter.

Q. —And which accompanied it.

A. —They are documents which accompanied this
34803 letter from the United States Steel Corporation, W. A. Irwin.

Q. And without telling the exact contents of 2463 A to C, what is that document?

A. What document is the memoranda on United States Steel Corporation letterhead, general counsel's office, with the subject regarding relations with competitors and signed by Nathan L. Miller, general counsel.

Q. And that purports to be a letter, then, prepared by Governor Miller as general counsel for the United States Steel Corporation?

A. Yes.

Q. Which was sent to you by president of the United States Steel Corporation?

A. Yes.

Q. And what did you do with it, if anything.

A. May I refer to this?

Q. Yes.

A. I sent that to Fred Stone who was general sales manager, and asked him to acknowledge it and—

Q. You may refresh your recollection by looking through the rest of the file and telling us whether anything else was done.

A. The acknowledgment was sent and then F. L. Stone, vice president and general sales manager, sent a copy of these two memoranda, one headed, "Relations
34804 with Competitors," and the other headed "Sales Methods"—I didn't bring that out before.

Q. You are referring to the two memoranda?

A. Yes.

Q. Prepared by Governor Miller?

A. Yes. Vice president and general sales manager Stone sent copies of these to our sales managers at branches, also, saying these are interpretations of laws by our Legal Department that are sent to you for general information.

Q. What was the date on which that was sent?

A. June 24.

Q. What year?

A. 1932.

Q. Is that the date Mr. Stone sent it to the—

A. Yes.

Q. —Sales Managers?

A. Yes.

Q. Do you know from your own memory whether or not those memoranda were sent to your sales office at subsequent times to June 24, 1932?

A. I don't remember very definitely, but I think that is right; I think—

Q. Would you refer to these papers that I hand you and see if they refresh your recollection.

Just thumb through them.

34805 A. Yes.

Q. If they refresh your recollection as to whether those documents, opinions of counsel, were sent to your office at subsequent times to June 24, 1932?

A. May I look at that? My answer to that, of course, is yes.

Q. And can you indicate some of the dates on which they may have been sent?

A. The top record here is March 13, 1936, in which vice president and general sales manager Stone refers to the previous letter of 1932 and says that it is important—shall I read from that?

Q. I think that is all right. If you make it quick.

Trial Examiner Norwood: No, don't read it.

Mr. Wooden: No.

Mr. Hershberger: All right.

The Witness: On March 13, 1936, vice president Stone called attention to those previous two memoranda.

By Mr. Hershberger:

Q. Again sent them?

A. And said it was important that they conform.

34807 New York, New York,
Friday, March 15, 1946.

34808 BENJAMIN F. AFFLECK, resumed the stand and testified further as follows:

Direct Examination.

34815 (RESP. EXS. 2463-A, 2463-B, 2463-C, 2464-A, 2464-B, 2464-C, 2464-D, 2464-E, and 2465, were offered and received in evidence.)

By Mr. Hershberger:

Q. Mr. Affleck, I now hand you a group of documents that have been marked for identification Exhibits 2466-A to 2466-F, inclusive.

Will you take these, beginning with 2466-F and going backwards, state for the record just briefly what they are? Don't give the contents of them, but state whether it is a letter and if so, what it was and what for.

A letter from whom, to whom, and the date and so forth.

A. June 14, 1932—

Q. Just a moment.

Identify each one by the number so that the record will show just which one you are talking about.

A. Respondents' Exhibit 2466-F, a letter from—

34816 June 14, 1932—copy of letter, I should say, from vice president and general sales manager Stone to president Irwin of the United States Steel Corporation, New York, acknowledging receipt of Mr. Irwin's letter of June 10.

Q. That is the letter that is in evidence as Exhibit 2465; is it not?

A. Yes.

Q. Now, tell us what the next one is in the same brief way.

A. The next is a—

Q. What number is it?

A. 2466-C is a copy of a letter from vice president and sales manager Stone, June 24, 1932, to—shall I read the names? To the sales managers at different offices of the company?

Q. Universal?

A. Six of them. Of the Universal Atlas Cement Company.

Q. Transmitting something?

A. Oh, transmitting two memoranda dated June 7, one headed "Relations with Competitors" and the other "Sales Methods."

Q. And that refers to these same documents?

A. Yes.

Q. Identified as Respondent's Exhibit 2463-A to C and 2464-A to E, does it not?

A. Yes. The next?

34817 Q. Yes.

A. Copy of letter—

Q. What number is that?

A. 2466-E is a copy of letter from vice president and general sales manager, Stone, June 14, 1935, to sales managers at branch offices, beginning:

"For your information herewith is copy of letter dated June 11 from The Cement Institute about—"

Q. Don't read the letter. Just state whether it refers to the exhibits and encloses copies of them.

A. And it also refers to letter of June 24, 1932.

Q. The one you previously identified?

A. Which I previously identified. With copies of two memoranda "interpretations of laws by legal department."

Q. Being the same as the exhibits previously received?

A. Being the same as those exhibits.

The next is a letter from president W. A. Irvin of the United States Steel Corporation, March 10, 1936. That is Exhibit 2466-D.

Q. Whom is to?

A. To me as president of the Universal Atlas Cement Company, Chicago, referring to Mr. Irvin's letter of June 10, 1932, and two memoranda dated June 10, 1932, and saying:

"We suggest that you and the heads of your Sales Department again review these memoranda."

34818 Q. You are—

A. "Two additional copies of which are attached."

Q. And the memoranda referred to are the same as we have put in the record?

A. Yes.

A. Next is 2466-B, letter from me as president of Universal Atlas Cement Company, March 12, 1936, to president Irvin, United States Steel Corporation, acknowledging receipt of his letter of March 10, with enclosures referred to, and saying:

"These will be given due consideration and we will be governed accordingly."

The next is a copy of letter—2466-A, copy of letter from vice-president and general sales manager Stone, March 13, 1936, addressed to the several sales managers of the company at the different branch offices, in which he referred to—

Q. Just state whether he again encloses these memoranda?

A. He again encloses these—he again encloses copies of these two memoranda, and says:

"Because it is important that both these subjects be thoroughly understood and kept in mind" and so forth, "we suggest you and interested others under your jurisdiction review the two memoranda mentioned."

34819 Q. You should not quote from the letter until it is received in evidence.

A. I beg your pardon.

Q. That is sufficient. That was all of them?

A. Yes.

34820 (RESP. EXS. 2466-A, 2466-B, 2466-C, 2466-D, 2466-E, and 2466-F were offered and received in evidence.)

Q. Mr. Affleck, I am going to ask you to hold this copy of 2463-A to C. I would like to ask you some questions about it.

Mr. Hershberger: Your Honor, I might say this, 2463-A to C is a letter consisting of a little more than two pages—two and a third pages long. It is so important and there are so many exhibits, I would like to have it copied into the transcript.

I know, as a rule, we do not copy exhibits. There have been some copied, but this goes so vitally into our instructions that I think it would be much better if you would relax the rule and let it be copied in.

Trial Examiner Norwood: Well, the rule was made because of the insistence of the respondents on that, and I think it will serve the purpose if you will just
34821 make a statement sketching, in a few sentences, the subject or substance of it, and that can be done.

Mr. Hershberger: Well, I would like to quote, then, certain parts of it without quoting it all, if there is no objection.

I will want to interrogate the witness about some of it, but it seems to me the record would be a little easier to follow if the letter, which isn't very long, were copied into the record.

Would you have any objection, Mr. Wooden?

Mr. Wooden: No more than I have to the exhibits.

Trial Examiner Norwood: I think, possibly, we can find it better in the exhibits than in the record. We will index it at both places.

If counsel will just sketch it and make it very short and read one or two excerpts, I think that would be sufficient.

That is Exhibit 2463-A to C. Go ahead.

By Mr. Hershberger:

Q. Referring to the first paragraph, Mr. Affleck, at:

"No understanding, arrangement, or agreement, 'gentlemen's' or otherwise—can be lawfully entered into between competitors,":

would you say that, in your regime as president of the company, Universal-Atlas Cement Company, extend-
34822 ing over many years, that your instructions to your various officials had been in line with that statement, that there should be no agreement made, gentlemen's or otherwise, with competitors?

A. Yes.

Q. And, so far as you know, there has been no agreement made with competitors in reference to your business, has there?

A. Yes.

Q. There has been?

A. No. There has not been.

Q. Referring to the second paragraph of 2463-A, you will note that the letter states it is permissible for competitors to exchange information on past sales, prices, capacities, costs, and the like, to discuss conditions and needs of the industry, to provide appropriate means for standardization of the product, and of cost accounting systems, to establish standards of business ethics, and to—agreements not to engage in methods of unfair competition.

Referring to these various matters I have just
34823 read from Paragraph 2, will you take them separately, and indicate to what extent in your contacts

with competitors, either through the Cement Institute meetings or through casual meetings with competitors, or otherwise, you and your competitors have engaged in any of those activities mentioned in that particular paragraph.

Take each one by itself, and discuss it.

A. There has been very little discussion between competitors and ourselves with respect to sales prices, costs, or capacities, discussions considering the—discussions of the needs of the industry, yes, of course.

Q. Just what do you mean by that?

A. Well, whether business is good or bad, and what can be done to improve business, increase the use of our product.

Standardization of product: in that respect there was discussion between competitors who cooperated with the American Society for Testing Materials, the American—United States Bureau of Standards, and with the various Government departments.

Q. Was that—

A. We were desirous of having the product standardized so as to simplify manufacturing operations, and effecting economies, that was discussed.

Q. When was that discussed?

A. Oh, that has been discussed for a long time. 34824 Thirty-five years that I remember or more.

Q. Were those discussions with a view to establishing uniform products; is that—

A. No, no.

Q. Just a moment. Let me ask the question.

Trial Examiner Norwood: I think the counsel will have to ask what those discussions were intended to develop instead of leading him that way.

By Mr. Hershberger:

Q. Let me ask it this way—

A. I have already been led. May I follow?

Q. Let me ask the question this way: what, if any relationship to selling methods, did the discussions of standardization have?

A. That clause or paragraph in this letter had no relation whatever to the commercial aspects of the business, and there wasn't any consideration of those in this connection with standardization of products.

Q. Take the first subject that is mentioned in that paragraph, past sales and prices.

Were those particular subjects the matter of discussion?

A. To some extent, perhaps, but very little.

Q. And capacity, was that the subject—

A. Capacities was not the matter of much inter-
34825 est. Capacities were generally well known by each cement maker. He knew pretty accurately what equipment was in the different mills around because it was customary, in the industry, to exchange courtesies and admit visitors.

I was always welcome; I visited other mills, and they were welcome when they visited our mill.

And a cement man could tell at a glance almost what the capacity would be by looking at the equipment and the size.

Q. Take the subject of cost. Has the matter of cost been discussed?

A. Practically no, not at all. Generally speaking, the matter of what costs were was a secret rather carefully guarded by each cement maker.

Q. Would you say that the discussions you indicated a while ago you had with competitors about business ethics was a matter that had developed in a particular period of time, or would you say that covered a long period of time, and if in a particular period of time, what would be the period?

A. That relates to the last line there?

Q. Yes, business ethics. You said business ethics had been the matter of some discussion?

A. Matter of business ethics was discussed to some extent, of course.

34826 Q. How long ago?

A. Oh, that goes back a good many years, and as the industry grew, and as more people entered the business, I think the tendency, as is usually the case with large businesses, was to get the business on a higher plane of good ethics.

If I thought someone was guilty of an unfair practice or defamation of character, or some of the things mentioned in the—if that compendium that was here yesterday, I wouldn't hesitate to scold him for it and tell him I thought he was a louse, or something of that sort.

Don't put the word "louse" in there.

Q. You mean by that, you thought he wasn't doing the thing that was fair?

A. Yes.

Q. In that connection, what element, if any, of obligation was there on their part?

A. Not a bit. Not a bit.

Q. Well, now—

A. Only the obligation of his own conscience.

Q. Well, now, referring to these various things that we have talked about, did the period of the N. R. A. make any difference; in other words, is what you said relative to N. R. A. period or not?

34827 A. No, that does not refer to N. R. A. period at all. During N. R. A., we went along and established our Code Authority and did everything that was called for by the—

Q. In other words, your statements referred to the period before—

A. Oh, yes.

Q. —And after?

A. Yes.

Q. Now, to what extent did the Cement Institute assist you or provide a vehicle for such discussions as were had after N. R. A.?—As I remember, yesterday, you testified you did not belong to Cement Institute prior to N. R. A.?

A. Correct.

Q. And after you did belong to the Cement Institute, to what extent did they provide a vehicle for such discussions of these subjects as you have indicated?

A. At the meeting of the Cement Institute, of course, an opportunity was afforded.

Q. Has that been a rather general practice for the Cement Institute to discuss the question of past prices?

A. Not,—no, ex[illegible] during—no, during—either during N. R. A. we wouldn't—it wasn't of any special interest then. And since we joined the Cement Institute, I don't think prices have been—either past or future prices have been the subject of much discussion.

Q. Well, future prices?

34828 A. Not at all.

Q. You say "of much discussion." Do you mean to indicate—

A. I mean past prices. And future prices, not at all.

Q. Did the Cement Institute provide a vehicle for discussing cost accounting systems at all, in so far as you were present at any of its meetings?

A. I don't think it did, Mr. Hershberger. I don't remember any discussions on cost accounting. Years ago, the question of cost accounting was a subject of discussion in the Portland Cement Association. That was at a time when cost accounting was very crude.

But by the enactment of certain tax laws, it became quite necessary for cement companies and other companies to keep much more accurate record than they had before.

Q. Referring to the third paragraph of the letter, it is indicated that the gathering and dissemination of statistics, the standardization of product, and of cost accounting systems and the establishment of proper standards of business ethics, and the definition of fair and unfair methods of competition, are legitimate subjects for the activities of trade associations, or of direct discussion between competitors, without the intervention of trade associations; but that the association may not be used to cloak directly or indirectly unlawful agreements.

Would you say that—or would you not say that
34829 your company had exercised these various things that this letter indicates are fair and proper, or are legal, to the full extent, or would you say that you had not done those things?

A. We followed the instructions very closely, as closely as we knew how.

Q. Referring to the Paragraph which begins at the bottom of page 2463 A, which is the first page, it says that each competitor must be free to act as he pleases without any contractual or moral restraint or coercion whatever. Each has a perfect right to be guided by self-interest, to refrain from acts provocative of retaliation, and to do what he can, free from any moral or legal restraints to prevent demoralization and to stabilize the industry. To that end the fullest discussion and the fullest exchange of information are permissible. The harmful effects of cut-throat competition, of unfair trade methods, of selling below cost or even a fair margin of profit, and the like, are legitimate subjects of discussion. But the line must be drawn at anything, no matter what, involving coercion or restraint, whether contractual or only moral, which interferes with the free and independent action of each.

In other words, reliance must be placed upon enlightened self-interest, not upon any form of concerted action
34830 or understanding, express or implied.

And then he uses as illustrations in the document,

a statement that it is permissible to inform competitors of past prices but not of future prices, because that involves an obligation, moral or otherwise, to charge the prices named.

Now, I would like to ask you whether you complied with that statement in the conduct of your business?

A. We did.

Q. You mean by that, you refrained from discussing with your competitors, future prices. As a matter of fact, did you discuss prices to any considerable extent?

A. Very seldom.

Q. Be a rather rare instance, wouldn't it?

A. Oh, occasionally, casually.

Q. There was no actual function, was there, of the Institute or any other group, to—

A. No.

Q. —Regularly discuss prices?

Mr. Hershberger: I think that is right.

34831 I merely want to call attention, without asking it to be quoted in the record, that some of these additional exhibits, 2466-A to D, call particular attention of the salesmen to whom the exhibits were written, advising them carefully to follow these instructions which had been sent out under the form of Exhibit 2463-A to C and 2464-A to E.

I call that to the attention of the Examiner, so that if these exhibits are not read particularly by him, there will be that thought in mind that these exhibits call particular attention to these, and direct the men to whom they are written to follow them carefully.

Trial Examiner Norwood: I shall study them very carefully.

Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Hershberger:

Q. Mr. Affleck, what was the method by which the Universal Atlas Cement Company made its price while you were at the head of the company?

Now, I want that stated in a very concise way so that it won't take much time. In other words, how did we arrive at prices? How did you arrive at prices?

34832 A. You mean our price base or—

Q. Well, what did you do to make a price?

A. To make a price, we took a base price at our mill, added the freight rate to it, and named that price as the price at destination.

Q. Now, is that the way you—

A. That is the only method we used except where we found that our price made in that way at destination was too high—was higher than the price made at that destination by some competitor.

Q. Then, what would you do?

A. Then we would meet the competition at the point of delivery.

Q. And why did you do that?

A. Well, because we could not sell a barrel of cement if our price was higher than our competitor's price.

Q. Why do you say that, that you could not sell?

A. Because no—no cement buyer will pay a higher price for our product than he can buy some other product for of the same kind and quality.

Q. You are saying that because of experience; is that the background of that?

A. On experience.

Q. Well, now, you say that that is the way you make your price?

A. Yes.

Q. You always make your price by a price base plus freight. There have been many statements, I believe, in this case that that amounts to making your price on a formula.

Would you discuss that, or give your reaction to whether that means formula? Why do you do it that way? Why don't you just put a bunch of figures in a hat, pick one out for Fort Wayne, and another one for Indianapolis?

A. Well, the word formula is of recent origin, as far as the cement industry is concerned. Having been in the business a long time, the method of pricing, making a price delivered at destination, has just been a matter of growth, not a system, nor a—nor a formula, just a—just a practice which came into use by reason of the fact that it was the simple, logical method of marketing our product.

Perhaps I should say that there are exceptions to that general rule where there are certain zones in—most of them, I guess all of them in and around large cities, like Chicago and Pittsburgh, and metropolitan New York, and Cleveland, where the—it would be quite impracticable to

have a great variation in price depending on varying freight rates to reach customers' yards on different railroads.

Q. Then, what do you do in such zones?

A. In a zone of that sort, we would try to arrive
34834 at the average freight from our mill to the points in the zone, and we make a uniform price to all customers within that zone.

Q. You mean to say that you use an arbitrary freight rate for all shipments into that zone?

A. Arbitrary, yes.

Q. It might be a mean or might be a low—

A. Might be a mean or an average. I don't like the word "arbitrary" exactly, because it seems opposed to reasonable. But it would be quite out of the question for us to sell or offer to sell cement to a dealer here at a certain price and offer to sell a dealer who might be right across the street at a higher price, because this railroad over here was a different railroad and reached through two or three switching lines, while they, in their respective local territories, are competing with each other, and they must necessarily buy at the same price.

Q. Now—

A. Another reason for—

Q. Let me interrupt you for just a moment, please. In your discussion, remember that when you designate a point on the table, it does not show up in the record, so—

A. Well,—

Q. It's all right. Go on.

Trial Examiner Norwood: I think that statement is very clear.

34835 Mr. Hershberger: Yes.

The Witness: Well, I won't gesticulate any more.

By Mr. Hershberger:

Q. Just try to keep that in mind, so that in the future, you will speak about a particular case rather than indicating on the table.

A. Then another reason which tends to set up a zone price in the metropolitan area, is the fact that the freight rates from outside mills, in all probability, are the same to all these points.

Q. You mean by mill—

A. From one mill to different points, there may be

quite a variation, but from another mill more remote, those destinations would all be in one group, see.

Q. In other words—

A. That has worked very satisfactorily. Customers have recognized the fairness of it, and it's gone along very smoothly.

Q. You mean that the mill close to the city might have different freight rates, different freight rates to different points in the city, but that a mill, say, a hundred miles away—

A. Would have a uniform—

Q. —Might have a freight rate that would be uniform to any part of the city?

34836 A. Yes.

Q. Well, then, that zone price is an exception to the—

A. Exception to the rule.

Q. To the rule that you stated a moment ago of your general method?

A. Yes.

Q. Of making prices?

A. Yes.

Q. Well, now, go back to the question I asked a while ago: Why do you make your prices generally—leaving out these exceptions for the time, being—why do you make your prices generally by taking your price base plus freight, as you have indicated?

Why don't you put some figures in a hat and take out one and say, that's for a certain town?

A. Well, such a method wouldn't make sense; because there would be no reason for pricing goods by such a method.

Trial Examiner Norwood: I think all that has been made clear so many times in the record—

The Witness: Being that—

Trial Examiner Norwood: —That particular question is obvious.

By Mr. Hershberger:

Q. Well, now, are there any other exceptions to this general method of making price? You have named

34837 zone prices. Do you have some other exceptional prices?

A. There would be another exception where, if I re-

member correctly, to meet foreign competition, particularly in a city like New York—

Q. What do you call those? What do you call those prices?

A. Those are arbitrary prices, zone prices or perhaps more—I think the word "depressed" prices has been applied to those areas.

Q. Do those prices have any relation whatever to the freight rate and price base or not?

A. No, no.

Q. Well, do you find it necessary, nevertheless, to meet those prices?

A. Yes.

Q. And why do you find it necessary to meet them?

A. We can't sell our—our product at higher than some ore else makes.

Q. In other words, the customers won't pay more?

A. Customer won't pay more for a standard brand.

Trial Examiner Norwood: Now—

The Witness: A—I think if I remember the testimony there has been a great deal of testimony to the effect—to that effect by, among others, by Government purchasing agencies. At least some of them—

34838 By Mr. Hershberger:

Q. Well,—

A. —Have testified that they—

Q. Let's pass that on.

Trial Examiner Norwood: Well, now, when you find, as you stated a while ago, that a price at a given point is under what base plus freight would be, and you meet the price that you find there—

The Witness: Correct.

Trial Examiner Norwood: Then suppose that you have an order from another point in that vicinity or beyond it freight-wise from your point, how would you make that price?

The Witness: Make that the same way, your Honor. Take our price base, add our freight. If that was higher than some competitor was making at that point, we would meet his price, if we wanted that business.

Trial Examiner Norwood: I'm assuming that you didn't find what your competing price was at that point. Suppose that you had to make this price without knowing. You know the point A where you first met a lower price,

but the point B is a little further beyond that freight-wise, and in the vicinity, and you haven't the competing price at that point, but you are asked for a quotation.

3483 Now, how would you make that price?

The Witness: I think the geography of the situation would indicate that the price—if the town was nearby, it would probably indicate that the price would be the same.

If our rate was the same, the probability is that the rate from competing mills would be the same and ours the same.

Trial Examiner Norwood: Well, it's further freight-wise from your mill and consequently, further freight-wise——

The Witness: Oh, yes, I see.

Trial Examiner Norwood: ——From this competing price that you meet.

The Witness: I see.

Trial Examiner Norwood: Now, just how would you figure that out?

The Witness: Well, it's very easy to ascertain what competing prices are. If our prices——

Trial Examiner Norwood: Well, now, let's assume—can't you assume that you didn't know the price at B?

The Witness: Well, generally——

Trial Examiner Norwood: Wouldn't you analyze the price carefully and get factors there?

3484 The Witness: Oh, yes.

Trial Examiner Norwood: Yes.

The Witness: I think I have indicated that our method of marketing was an orderly method.

Trial Examiner Norwood: Yes.

The Witness: Price base plus freight. The further the freight, the higher the price. We would naturally assume, and correctly assume, that other cement companies do their marketing in an equally orderly fashion. And it would be a relatively easy matter for us to ascertain by a comparison of prices at a few points, what his price base was and what his freight rate was to that different point that you have mentioned, and we'd meet that price.

Trial Examiner Norwood: You would anticipate, then, you would figure out those facts and make the price at B this base that you had determined, plus the freight to B?

The Witness: Yes.

Trial Examiner Norwood: Instead of the freight to A?
The Witness: Yes.
Trial Examiner Norwood: Thank you.

By Mr. Hershberger:

Q. Now, are you obliged to do that?
34841. A. No.
Q. Why do you do it?
A. We do it because we can't sell our product unless we make our price as low as anyone else.
Q. In other words, your action in voluntary, is it?
A. Oh, yes.
Q. Now, with respect to arbitrary prices that you mentioned, or, I believe you called them depressed prices at ports, has it been the practice of the Universal Company, or was it during your regime as president, to establish those prices or did you merely meet prices that others established?

Which practice did you follow, established prices, port prices, or meeting them?

A. That would come under the sales manager's jurisdiction—
Q. In other words, you are not—
A. —And I can't remember exactly, but I feel pretty sure that we did not initiate any of those depressed prices. We may have, but I don't think we did. We followed what someone else did.
Q. Are there any other exceptions to the usual method of price that you mentioned—that is, your price base plus freight—other exceptions than arbitrary prices and zone prices?
A. I don't think of any.
Q. Well, let me ask you if you have had—do you
34842. ever have occasion to quote a price in a town where normally your price base plus freight would make the price, at a different price than that?
A. I don't quite follow you.
Q. Take a location for example, where according to the method of pricing that you have stated you would normally charge price base plus freight. That would be your current market price, as I understand it.

Now, do you ever find occasions at that location to quote a different price?

A. I don't think we do. That's—that's our procedure.
Q. In other words, you always do it just that way?

A. Yes.

Q. You never cut a price?

A. Oh, there are—they, well, yes, I see what you mean. There have been times when there was great irregularity in pricing and—and under those conditions, we'd do the best we could at finding out what the price was.

Q. Well, now, I'd just like to have you tell us whether there have been particular periods, and if so, indicate them as nearly as you can, where there has been any substantial amount of deviation from the so-called current market price in which your company has had to participate?

A. Well,—

34843 Q. What I mean by it—what I mean by "had" to get the business. I don't mean by any threat of any other people.

A. Well, the most—the recent period of demoralization in the cement industry was in the period 1931 and two and three; 1930, to some extent, as I remember, but '31 and two, especially.

Q. And what happened?

A. Where it was just a general demoralization, and cement was sold at any price without much reference to—especially on the large lots, what few there were buying that period.

Q. Was that country-wide or located in certain places?

A. I think it was pretty well country-wide. Worse in some areas than others, but pretty general, as shown by the financial return on—I don't think any companies were in the black for those two or three years or four years.

Q. Would you say that the use of the basing point system, so called, had anything to do with that condition?

A. Not at all.

Q. Was it a condition that would or would not have happened irrespective of the basing point system or not?

34844 Q. Can you expand on it in more detail, on the subject?

A. If I may recite this. The peak year of cement shipment in the United States was 1928. 1929 began to show a slight shrinkage.

Prior to 1928, there had been a—what might be called almost a spectacular growth over two or three or four decades, with only a slight interruption in 1921 and two and a slight interruption during the war.

Q. Speak a little more slowly, please. Just a little slower.

A. When the—when there appeared a shrinkage in total business, it meant that each fellow ought to have had a shrinkage in his business.

Not having been accustomed to anything like a shrinkage, it got on his nerves; and in order to hold his business up to where it was, getting more than his share of the reduced volume of business, he yielded to temptation to cut the price here and there where a desirable large
34845 order appeared. That began in a slight manner in 1929, and in 1930 was worse, I think considerable shrinkage in total volume, 1931, away down. And in such a struggle for self-preservation, you would have to get volume.

And the lower the—the greater the shrinkage in volume, the greater the demoralization in price.

34846 Q. During this period of time, would you say there was a uniformity in price from the various manufacturers when these prices were cut, or was there not?

A. On the—the sequence of things would be about this, there would be cutting—secret cutting here and there to get this or that or the other particular piece of business. After that cutting had continued for a period of time, the actual prices became so far out of line with our price, say, plus freight, that we reduced our price base and that operation proceeded pretty much all over the country, until the—until the price base got away down. I forget how far.

Q. Well, when it got away down, were you selling at the same price as others, or at different prices?

A. Well, when the price was down at a perfectly
34847 ruinous level, or figure, the tendency toward uniform delivered prices was exactly the same as when prices were higher, with the exception that, to some extent, the mill would not reach out as far, where his net would be perhaps less than his out of pocket cost. By out of pocket, I mean material and labor, disregarding overhead, taxes, and advertising, selling, all that sort of thing.

Trial Examiner Norwood: In other words, those prices were still uniform, but lower?

The Witness: Still uniform. Just as uniform, practically, at ruinously low level as high level.

By Mr. Hershberger:

Q. To what do you contribute that phenomenon, if it is a phenomenon, that those prices were uniform at a low level to the same extent as the high level?

A. As I said before, nobody will pay more for cement than the price at which he can buy it. The customer practically makes the price uniform.

Q. In other words, you think the price—you think the customer makes the price uniform, rather than the method of selling makes price uniform?

A. Yes.

Q. Now, of course Mr. Affleck, on this method of selling, you generally have, where you have a price base as you have indicated—you fix that price base yourself, 34848 don't you—that is, your company fixes it?

A. Yes.

Q. Are there any factors that affect what figure you may give as a price base?

A. Oh, yes, we can have the price base at our mill too much out of line with price bases at competing mills or in mills in competing territory—

Q. Of course—

A. —Or competing mills, is better way to put it.

Q. That follows, I suppose, because of the fact you would make a different price if you did?

A. Yes.

Q. What are the factors that influence the level at which you can make a price base, if there are any factors? Why don't you put your price base way up? Say, three times as high as it is at your various mills today?

A. That in a way would be most unwise because it would tend at least to some considerable extent, to curtail the use of our product and encourage the use of competing products. By that, I mean, not cement but other building materials.

Q. In other words, if all the cement companies put their price up, you think it would restrict the volume of cement?

A. It would tend to, yes.

Q. That is, if they got them up?

A. Yes.

34850 Q. What I really want to find out from you, Mr. Affleck, is do you consider this impact of competi- 34851 tion from other products has a substantial influence on the price base which you can establish—you con-

sider it as an important element? That is what I really want to know.

Is it something that is real and tangible?

34852 The Witness: Yes.

Q. Well, now, you have named one factor that affects the price at which you can set the—the price base that you can establish.

Are there any other factors that your particular company has considered in determining its prices?

Does the—

A. We have never felt it was good business to get the price up to a level which was out of reason. I recall one instance back, I think, in 1921 or two, there has been—where there was a switching strike or railroad strike that—so that cement delivered for use was very scarce. It was hard to make deliveries, and the prices charged by most of the companies for such cement as they could find cars for and get to destination, rose very high—oh, it went
34853 up fifty cents, a dollar, two dollars a barrel. I consulted Mr. Farrell, who was then president of United States Steel and Judge Gary, who was chairman, and I told them I felt I ought to acquaint them with this situation; namely, that our competitors were selling for a dollar a barrel more than we were and what should I do about it?

Judge Gary said, "well, aren't you making a fair profit at the price you are charging?" I said, "yes, we are making a fair profit." He said, "Do you think it would be proper if you are making a fair profit at what you are charging, to charge more?" And I said, "I don't think it would." And he said, "Go ahead, take the price you are charging for what cement you can ship, and deliver, and be satisfied with it."

And we followed that course.

Q. In other words, you were there following an element of public interest in determining your price?

A. Public interest, and I think we were satisfying our own conscience, at the same time.

34855 By Mr. Hershberger:

Q. Will you state the various methods that your company has or did have while you were its president, of finding out what price it had to meet at various destinations?

Trial Examiner Norwood: What prices other competitors were making.

The Witness: Principal method, of course, was to find out from the customer.

By Mr. Hershberger:

Q. Then how would you do that?

A. By asking him. We would quote a price and he says, "Your price is too high." He will say he can buy for so and so. That is the chief method of—well, in fact, that is the only method, and in case of a change in price by a competitor, we are apprised of that almost immediately. We have, at the present time—I don't know, somewhere around two hundred salesmen traveling up and down the country in motor cars, making many calls a day, and they are reporting into their respective branch
34856 offices what competitors are doing in the way of prices.

Trial Examiner Norwood: You need not go into detail on that. It has already been covered so many times.

By Mr. Hershberger:

Q. Is there any way you have—any other way that you have?

A. That is chiefly the way. That is the only way.

Q. You get telephone calls at times?

A. Oh, yes.

Trial Examiner Norwood: You get this information from your salesmen and they, from your customers?

The Witness: From our customers through our salesmen.

By Mr. Hershberger:

Q. You don't get it from your competitors?

A. No.

Q. Of course, there are other ways you can find out prices, aren't there, other than getting them from your customers?

34857 A. Prices in most cases, in principal cities, are published in the trade papers, the Rock products and Concrete and Engineering News.

Q. If you were a salesman, and you were sent out to Fort Wayne, Indiana to sell cement, would you think—would you anticipate there would be a great difficulty for you to know what the price of competitors were in that section?

A. No, not a bit.

Q. It would be a very simple matter for you to find out?

A. Many—for many years, cement prices have been

practically broadcast. Dealers all know that. They know there is nothing confidential about a cement price. If this were a specialty sold at special prices, dealers might regard prices made to them as something to be kept confidential. But it is generally understood throughout the country, cement prices are open and published, and nothing secret about them, so that the information concerning price is passed very freely between customers.

34859 Q. You have spoken about the prices at destination being generally uniform, whether the prices are high or low, and you have indicated, I believe, one of the reasons is the customer won't pay more for one brand than another.

What is the reason for that—that they won't pay more for one brand than another?

A. Cement is a standard product made to meet specifications and it just wouldn't be—

Q. What do your customers use their cement for, do you know?

A. Wouldn't be any sense to pay more for one brand than another. And the uniformity comes about—we are glad of it and like it—the delivered price method of selling. Most of our customers are dealers. The great majority of our business goes to dealers.

They do not use or consume cement, themselves.

34860 They sell it. And they ought to be treated without discrimination so that they will be all on the same basis of cost of their material in their sales to their customers.

Q. You mean by that, they are really in competition among themselves?

A. Dealers are in competition among themselves.

Q. Well, now, there has been considerable discussion in this record, from time to time, about why your company and other respondents sell almost always only on delivered prices.

Will you just summarize briefly the reasons why you sell on delivered prices rather than f. o. b. mill?

34861 The Witness: Does that mean f. o. b. mill at a rigid price?

By Mr. Hershberger:

Q. No, I don't mean to get into a discussion now of f. o. b. mill, but I want to know why you sell delivered.

Trial Examiner Norwood: Rather than f. o. b. mill.

The Witness: Principal reason we sell delivered is that is the way the customer wants us to sell it.

Having been in the business for many years, almost from the very beginning of the cement industry in the United States, the custom of selling, although not at first
34862 delivered, soon became a delivered price method because of—as customers became more numerous and the volume increased, that was the way the trade wanted it.

And over the years, that has been the established practice. And, if I may continue a bit here, I think I might say if there was any other satisfactory, or workable, or practical method of selling the product, of cement makers, than delivered prices, I should think among the thousand of cement executives, and sales managers, and salesmen, and dealers, during the past thirty or forty years, the method would have been developed and brought out and the cement maker would have been delighted to adopt it.

There has been no—if I may continue?

By Mr. Hershberger:

Q. Yes. Go ahead.

A. There has been no demand, to speak of, that I know anything about from our customers for any other way of buying than the method that has been in effect all these years with the exception of some isolated cases.

All satisfied.

Q. Does the matter of convenience enter into it at all?

A. Matter of convenience does enter into it. The dealer wants to know what his material will cost delivered at his place of business at the destination. We like the
34863 delivered price system because if is a simpler system than an f. o. b. mill system would be with the necessary variations that you have coming in.

Customer likes it because he is spared any annoyance and expense, uncertainty, about freight rates—it is always more difficult to ascertain freight rate from a distant point to your point than it is from your point to a distant point.

Q. To what extent would you say there has been competition in the cement business during the period of time—

34864 Q. You stated that many times the price you charge your customer at a destination is the same as the price a competitor would charge, have you not?

34865 A. Yes.

Q. When you charge the same price to your customer as your competitor would charge your customer, do you feel there is any rivalry in the prices between your company and the competing manufacturer?

A. There certainly is.

Mr. Wooden: Move to strike. I move to strike that as being another conclusion.

Mr. Hershberger: Your Honor, I want to say Mr. Wooden has asked that question repeatedly in his own case.

Mr. Wooden: It calls for a conclusion, a state of mind.

Trial Examiner Norwood: I think he may answer.

Objection overruled.

By Mr. Hershberger:

Q. What is the answer?

A. If my price is the same as competitors' prices at point of destination, I would certainly say there is competition. He and I are both—

Trial Examiner Norwood: Now, wait a minute. We have excluded the word "competition" because it has legal significance here. It is the issue, you might say, and I shall strike that.

Read that—

34866 The Witness: Pardon me.

Mr. Hershberger: Let me make this further statement for the record, so that there may be no doubt and it may be perfectly clear, your Honor.

Trial Examiner Norwood: Read the question first.

(The question referred to, and the answer, were read by the reporter, as follows:

"Q. When you charge the same price to your customer as your competitor would charge your customer, do you feel there is any rivalry in the prices between your company and the competing manufacturer?

"A. There certainly is.

"Q. What is the answer?

"A. If my price is the same as competitors' prices at point of destination, I would certainly say there is competition. He and I are both—.")

Mr. Hershberger: Let me say this for the record, if I may.

Trial Examiner Norwood: Yes.

Mr. Hershberger: I do not believe that the question of

whether there is or is not competition is in issue in this case.

I do not believe that can be an issue in any case. As I understand the law, there is no requirement in the law any place that there must be competition. The law
34867 only says it is illegal to restrain competition, leaving competition to come and develop as it may with its own force. There is no law that says you must compete.

Trial Examiner Norwood: That is right.

Mr. Hershberger: The law does not say to one man you must charge one price and to another man you must charge another. It is not a question of law whether competition exists. If a question at all, it is a question of fact, and therefore the witness should be permitted to say whether or not, in his opinion, these matters are matters of competition.

The question of law in this case will come eventually. But the question under these various statutes under which we are proceeding—

"Has there been restraint of competition?" And I think as a matter of fact, we have gotten off the track sometimes in evidence that has been produced in this case, to a certain extent at least, in that there seemed to be assumption on the part of counsel for the Commission that competition is something the law compels rather than something the restraining of which it prohibits.

Trial Examiner Norwood: The fact remains, the existence of competition indicates an absence of restraint, so I say it is an issue.

34868 Mr. Hershberger: That may be.

Trial Examiner Norwood: That is directly involved in the case, and what is competition is a question of law.

Mr. Hershberger: The Supreme Court, your Honor, has ruled, and I have the case in my hotel room, unfortunately I don't have it here, that whether or not certain acts are matters of competition are questions of fact.

Trial Examiner Norwood: I know the case you are talking about, and I know the other cases, too.

It ruled it is not error to exclude the conclusion of competitions in the absence of the facts of competition being stated.

Mr. Hershberger: We have stated a series of facts. I

have taken the various hypotheses that have been submitted in this case many times where Universal-Atlas has bid the same price as some competitors, and there is uniform price. Now, on that statement of fact, does Mr. Witness find that is a competitive situation?

Trial Examiner Norwood: You are going to—those facts are all in—

Mr. Hershberger: That is right.

Trial Examiner Norwood: Now you are perfectly
34869 free to argue to the Commission and to the courts, that this other competitive price made this respondent—forced this respondent to bring his price down to its level, and you may argue with them as to whether or not that is price competition.

Mr. Hershberger: Yes, but your Honor—

Trial Examiner Norwood: This witness' conclusion is not going to help us any with regard to that.

Mr. Hershberger: It should help in that it presents a question of facts. Now, if we cannot present that, look at the situation we are going to be in.

Trial Examiner Norwood: It is not a question of fact. It is just a matter of giving an opinion as to whether or not it is competition.

I shall strike, on my own motion, that last part of the answer which includes the word "competition."

Mr. Hershberger: Read the answer with that word omitted, so I may see where we are.

(The answer referred to was read by the reporter, as follows:

"A. If my price is the same as prices at point of destination, I would certainly say there is—"

Mr. Hershberger: I object to the striking of that.
34870 Trial Examiner Norwood: Yes, that stands. In order to be consistent with our previous ruling, I simply struck that word "competition." For reasons stated.

Mr. Hershberger: All right.

Mr. Wooden: Physically it is still in.

Trial Examiner Norwood: Well, no.

By Mr. Hershberger:

34871 Q. State for the Examiner, what your conception, as an experienced business man in the cement industry, of what the word "competition" is in the selling of cement?

A. The effort and strife of two or more cement workers to get the same business from—get the same business.

Q. Of course, that involves freedom from restraint or collusion?

A. Correct.

Q. No agreement?

A. If I may—well, skip it.

Q. Is that true, though the prices are the same, or does that involve prices being different?

A. Competition is there when the price is the same. It is quite out of the question for it to be stated that one of the competitors have a lower price. If one must have a lower price in order for there to be competition, who is going to select the competitor that is to have the lower price?

If—I would think that I was a poor salesman, or poor sales manager, if I couldn't sell goods at the same price as my competitor sells his goods.

If, to create competition, I must reduce my price, I am confronted with the probable certainty that my competitors will reduce their price. And then they are on the same or equal level and it is competition whether prices 34872 are the same.

Q. Does your definition of competition which you have given—or would your definition of competition, which you have given, differ any if the definition were what is your price competition?

A. Same thing, I think.

Q. In other words, you don't consider price com- 34873 petition to involve necessarily differences in prices?

A. No, not at all.

Mr. Hershberger: I think that is all I want on that subject.

By Mr. Hershberger:

Q. What do you understand, as a cement man, cross-hauling to be? You have heard that term used, have you not?

A. Many times.

Q. What does it mean in the—

A. Cross-hauling is—

Q. —In the cement industry?

A. Cross-hauling, applied to the cement industry, means in a general way the movement of cement from a mill into a

territory that is nearer, freight-wise, to some other mill, and vice versa.

That is, cross-hauling, as I understand it.

Q. In other words, if your mill would ship from one of your mill's location to a point that was freight-wise closer to a competitor's mill?

A. That would be cross-hauling.

34876 Q. All right. Mr. Affleck, in your experience of some thirty years in the cement business, has your company engaged in the type of cross-hauling that you defined?

A. Yes.

Q. Has that been your general practice throughout all that time?

A. Yes.

Q. Why did you do it?

A. We did cross-hauling in order to reach a larger territory, more diversified list of customers. We regarded cross-hauling as an expense, additional—or rather, the shrinkage in the net receipt at the mill we regarded as an expense, same as advertising, and selling, and travel-

34877 ing expenses, and all that sort of thing.

Q. Could you have sold as much cement over the period of time—

A. No.

Q. —That you were in the cement business as you did sell, if you had not engaged the cross-hauling of the type that you have indicated?

A. I don't think we should.

Q. Would it have been a substantially less amount?

A. I think so.

Q. Well, if you didn't cross-haul, that would mean, I assume, that you would be limited to ship to such distances from your mill as the price base at the mill plus freight would take you?

A. Correct.

Q. Now, do you have some mills within which that territory would be rather limited?

A. Yes.

Q. And do you find, therefore, that in order to sell the cement that is produced at that mill that it is necessary to cross-haul?

A. Yes.

Q. For that purpose?

A. Yes. And by a certain amount of cross-hauling, we would get a more even load factor on our plants. We
34878 overcome fluctuations, local fluctuations.

34882 By Mr. Hershberger:

Q. What effect does cross-hauling have on your price bases?

Mr. Wooden: I make the same objection.

Trial Examiner Norwood: Well, answer that factually, please. I will overrule the objection if you will do that. If you do not, I will strike it.

The Witness: What is the question? What effect does—

Trial Examiner Norwood: Read it.

(The question referred to was read by the reporter.)

By Mr. Hershberger:

Q. That means as compared with an absence of cross-hauling.

Trial Examiner Norwood: Yes.

By Mr. Hershberger:

Q. If you couldn't cross-haul.

34883 Trial Examiner Norwood: Assuming that—

The Witness: Pretty hard to tell what would be the effect of—

Trial Examiner Norwood: Well, assuming that you couldn't ship outside of this territory, which is controlled by your base plus freight, what effect would that have on your base prices?

The Witness: That would mean a rigid price base at the mill or a group of mills within the area.

Trial Examiner Norwood: You mean a rigid mill fluctuation?

The Witness: Yes.

Trial Examiner Norwood: Well, what would that do to you?

The Witness: Well, that would limit us to a certain small territory 'round each of our mills or around each group of mills that happened to be in the same group.

By Mr. Hershberger:

Q. Well, now, would that have any effect on your price base level, inability to cross-haul?

A. Well, it would have a very serious effect on our operations, under certain conditions. If I may continue along that line—

Trial Examiner Norwood: Go ahead.

34884 The Witness: For instance, in our Chicago territory, the building permits fell roughly from $300,000,000.00 per year in the middle twenties, to $3,000,000.00 per year in the early thirties.

We have our mill right adjacent to Chicago. If we had been limited to the territory where we have a freight advantage, where our price base plus freight would fix the price, we would have had a sorry return with a shrinkage of ninety-nine per cent. in building permit operations in Chicago. But, by reason of the fact that we do some cross-hauling, ship out into Illinois, beyond other mills in different territories, in different directions, we were able to take care of that situation measurably.

We met a terrific shrinkage in our total volume, of course. And you have the same situation in other areas. You have a crop failure or dust storm, or something of that sort, if there were no cross-hauling permitted, if everybody was limited to certain well-defined boundaries, where there's a crop failure or dust storm or slump in building operations, the mills that were not allowed to cross-haul would be—they would just stew in their own juice and have to wait for better times.

34885 By Mr. Hershberger:

Q. That means that they would have to subsist on a much smaller volume than before if they could not cross-haul?

A. And a volume which would be subject to violent fluctuations, which fluctuations are largely smoothed out by the operation of cross-hauling within reasonable bounds. Cross-hauling does not go beyond what I would call a reasonable limit. Nobody's going to cross-haul an unreasonable distance or—or shrink his net return at the mill in unreasonable amounts to get some business in a distant territory.

Trial Examiner Norwood: Suppose, though, that there were a shortage?

The Witness: Beg pardon?

Trial Examiner Norwood: Suppose that there were either a shortage or a greatly increased demand in a distant territory, and so great that the price of cement in that territory could command an increased price?

The Witness: Well, by such a cross-hauling, it would prevent the fellow who was fortunately situated from rais-

ing his price too high, because if he did, distant competition would come in by reason of cross-hauling.

34886 Trial Examiner Norwood: But I say wouldn't the increase in demand take care of that without following the general practice—without a system which permitted the general practice of cross-hauling?

The Witness: Well—

Trial Examiner Norwood: What would be the difference?

The Witness: I don't know, your Honor.

Trial Examiner Norwood: Go ahead.

The Witness: In fact, I don't believe I've followed your question very clearly.

Mr. Hershberger: Would you clear it up?

Trial Examiner Norwood: Well, I was merely inquiring to ascertain whether or not the law of supply and demand wouldn't adjust the situation that you have discussed, without the necessity of a system which provides for continual cross-hauling.

The Witness: No, I don't think so.

Trial Examiner Norwood: All right, go ahead.

The Witness: I don't think so.

By Mr. Hershberger:

Q. Mr. Affleck, if cross-hauling were prohibited, could your mills that are in isolated positions; that is, some of your mills that are not in a cluster with other mills and competitors—take for example, the Waco mill, for example, which is by itself, Waco, Texas, if cross-

34887 hauling were prohibited, could that mill compete in their effort to get cement business with competitors?

A. No, it would have a monopoly within its freight-wise territory, but it would have no competition there, nor could it compete with other mills, outside of that territory.

If I understand your question.

Q. That's right.

34889 Q. Mr. Affleck, will you explain what methods of selling cement could be used other than the selling of cement on delivered prices as you now use?

What other methods could there be? How else could you sell it?

A. Another method would be, of course, the f.o.b. mill, name the customer a price f.o.b. mill and let him worry about the freight rates and all that sort of thing.

And that f.o.b. mill price might be a fixed f.o.b. mill price to all customers, or it might be a—as a matter of fact, it

would have to be a variable price f.o.b. mill, which, with freight added, would meet competitive prices at point of delivery.

Rigid f.o.b. mill and variable f.o.b. mill would be the two methods, unless we might consider just a helter-
24890 skelter method of selling, by which the salesmen in the field would match wits with the customer and get the highest price out of him that he could.

Q. Could there be a method—

A. Which wouldn't be workable at all with a big industry with fifty or sixty thousand dealers in the United States.

Q. Could there be a combination of the present method of delivered prices and an f.o.b. mill basis, is what I meant to ask, which would involve—

A. Combination of price delivered at destination and f.o.b. mill?

Q. Yes, perhaps—

A. Sort of an optional?

Q. That's right, giving the option to the customer to select.

A. Yes, that would be a third method but—

Q. Now, taking those methods separately, I would
24891 like to have you state what, in your opinion, would be the results that would follow.

Take, for example, the rigid f.o.b. mill basis, if you want to, or the flexible, whichever you prefer to take first,—

Mr. Wooden: Your Honor—

By Mr. Hershberger:

Q. —and state what that would cause to happen.

Mr. Wooden: That is objected to as calling for speculation on the part of the witness.

Mr. Hershberger: Well, here's a man that's one of the oldest men in the cement business in this country. If he doesn't know, no one knows, and that's one of the—

Trial Examiner Norwood: Well, I think he has had actual experience in these methods, he has tried some of them out.

Can you base your answer on actual experience?

The Witness: I think so, your Honor.

I was salesman, sales manager and president during a period of forty years.

By Mr. Hershberger:

Q. You have sold—

Trial Examiner Norwood: You have sold some f.o.b. mill, haven't you, in your life?

34892 The Witness: Well, very little, very little.

34894 Trial Examiner Norwood: Answer the question.

By Mr. Hershberger:

Q. Take one of the three alternatives by itself, at a time, and try to keep it not confused with the others.

A. If we attempted to do business, or if we did business on the rigid f.o.b. mill price, that price, to be made to all customers alike, the effect of that would be to limit our territory to certain very definite limits, and confine our sales within the limits of that—of the boundary that was ascertained by a difference in freight rate, or difference between the price base of other mills, and the freight rate added to point of destination.

So, we really would be subject to the misfortune of having to put up with violent fluctuations, as I have tried to point out this morning.

Q. Within that territory—

A. Fluctuations in demand. We'd just be helpless. If the demand falls off in our territory, we would be precluded from reaching out beyond our nearby territory to more distant territory, and vice versa.

Q. In that territory in which you could then sell, what would be your relationship with competitors from other territories?

A. We'd have a monopoly, if I understand your question correctly.

34895 Q. And would that be true with competitors in their respective territory?

A. Yes, a monopoly except in cases where there are two or more mills in the same—at the same point, or in the same group, as in—we have in the Lehigh Valley and—especially, and in Kansas.

Q. Now—

A. Those mills would have a monopoly within the area bounded by the line that I attempted to describe.

Q. Would that have any effect upon the service to your customers?

A. I don't know whether it would or not, except that it's perhaps human nature for a seller not to be as considerate of his customer if his customer is situated so that he can't get away.

The service, I think, would be poorer than where there is a competitive situation.

Q. In the situation that you described a minute ago, where there were a cluster of mills in one location, what would be the effect on those mills?

A. In the case of the Lehigh Valley section, I think it would be very bad for companies having mills in that area, because it's a well-known fact that the Lehigh Valley mills are under the necessity of reaching out and selling their product in territories in all directions,—

34896 Q. Why is that?

A. East, west, north, and south, where their freight rates are higher than competitors; figure it, because the capacity is so large in that group, in the Lehigh Valley as compared with consumption of cement in the area where the Lehigh Valley has the lowest freight rate.

That's been the case for a long time, a number of years.

Q. What would that result in with respect to such mills as in the Lehigh Valley, for example?

A. Might result in the lowering of the price as they compete with each other in a relatively small area.

Be a matter of dog eat dog, cut-throat competition, and prices would probably go down until point of exhaustion was reached, and then they probably would rebound higher than before.

Trial Examiner Norwood: Well, now, assuming a variable f. o. b. price; that is, where it's varied to meet competition at a particular point—

The Witness: Oh, yes. Well, then, that would—

Trial Examiner Norwood: Then would that have the effect here?

The Witness: That condition would not apply, then, your Honor, at all. The net result of that would be in effect, the delivery—in effect, it would be the

34897 quoting of prices delivered at destination—

Trial Examiner Norwood: Yes.

The Witness: —And meeting competition at point of destination.

By Mr. Hershberger:

Q. In other words, it would be the same thing as you have today?

A. It would be the same thing as—as the so-called basing point system which makes prices delivered to point of destination.

Trial Examiner Norwood: That is, the economic effects would be the same?

The Witness: Yes, but it would be a very awkward, inconvenient method mechanically to name a different price to customers located at different points, in order to effect a price delivered at destination to—in line with competition at the point of delivery.

By Mr. Hershberger:

Q. And of course—

A. And another objection that I see, I think is that if the price were f. o. b. mill, there would be an opportunity on the part of buyers to do some manipulation which would result, or might result in—in dealers in the same town or adjacent towns—nearby towns, getting different prices which would put these dealers in a—some dealers
34898 in the position of having a favorable discriminatory price as against other dealers in the same towns or adjacent towns.

Q. Well, now, going back to this rigid f. o. b. mill basis, how would that affect your earnings?

Take for example, your Waco mill in Texas, if you can. That's an isolated mill, is it not?

34904 The Witness: I'm not so sure how it would affect the earnings, but I'm—

Trial Examiner Norwood: How would it affect prices, how about that?

The Witness: Well, I was going to say I was quite sure it would reduce volume of business shipped from the Waco mill, because the—as I remember it, the map or the comparison of freight rates from our Waco mill and freight rates from competing mills in various localities, gives a definite—fairly definite boundary within which the sales of cement are not enough to keep the Waco mills going.

The volume would be reduced.

Now, of course, whether the earnings would be
34905 reduced or not, is a somewhat different question.

If we could raise our price on the smaller volume of business enough to offset, our earnings might remain constant. But that would be a question.

By Mr. Hershberger:

Q. Now, with respect—would you have any further things to say with regard to the flexible or variable mill basis than you said in response to the Trial Examiner's

questions a few moments ago, or had you explained that fully?

A. I think I had explained that fully.

Q. Well, then, take the third alternative—

A. The variable, yes.

Q. Then take the third alternative, an option basis in which the customer could buy either way.

What would that cause to happen?

A. I feel very sure that that would produce a great deal of difficulty, and trouble, and complications.

Q. Now, illustrate, why?

A. Because in many cases where the geography indicates it, it would be found, I think, that if there were an optional arrangement by which the customer could take a price delivered at his point, or his place; or his price or a price at the mill, f. o. b. mill less—delivered price less freight—in my experience in many cases, he would go to the mill and get his cement.

34906 Trial Examiner Norwood: Off the record, just a minute.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

Complete your answer.

The Witness: So that the more distant mill would be at a very decided disadvantage. The distant mill would have to ship him a carload lot, whereas the nearby mill would deliver in small lots.

And, in the course of time, the customer would be confining his purchases to small lots from the mill located right in his locality.

By Mr. Hershberger:

Q. Now, illustrate how that would work in connection with your mills at Waco, and say the mills at Dallas, if you can.

A. As between Waco and Dallas, we have a situation comparable with many, many situations in other parts of the country, but this is perhaps a little more clear than others, because Waco is one hundred miles or so from Dallas.

If I remember correctly, that is. We sell quite a little cement in Dallas, although there are two competing mills adjacent to Dallas.

If the customer had the option of taking cement deliv-

ered at destination or taking at the mill at destina-
34907 tion price less freight, these Dallas customers would probably get the habit of going over to the nearby mill every few minutes, or every hour or two, and getting what they needed, and our chance of selling any cement in Dallas would be very much impaired.

So that, in the course of a little while, the two Dallas mills would be doing all the business there.

We would be shut out of Dallas and would be confined to our location—to our local territory, which as I indicated before, has not yielded enough business to support our mill.

Q. That statement is based on the assumption your price in Dallas, total price to the customer, would be the same?

A. Total cost. Service poorer.

Q. As is cost at Dallas mill?

A. Yes.

Q. How would you meet that situation?

A. Well, we couldn't meet it. We couldn't meet it except by lowering our price, and if we did that, Dallas mills would lower their price.

Q. In other words, if you couldn't do it—you couldn't do it as long as you were not in Dallas?

A. Be practically an impossible situation unless, as has been done here and there to a tragic extent, we built a distributing station or warehouse, something of
34908 that sort, in Dallas.

Q. That would cost what?

A. That would cost a lot of money. Our procedure then would be to ship cement to Dallas by rail and deliver it to the customer in small lots, the same as Dallas mills do.

Trial Examiner Norwood: And that would involve double handling?

The Witness: And that would involve double handling and expense.

By Mr. Hershberger:

Q. And what do you think this further handling in Dallas would entail in connection with other matters? Would that be widespread?

A. It might be very widespread. We have had—we have had examples of that in Washington. I can't remember the details, but there is a great amount of duplication of distribution facilities.

Washington—in Washington, there are competing companies that will not relinquish their Washington business; they went to terrific expense to equip to meet the competition.

Q. Now, just one further question, or one or two questions on one matter I want to ask you, Mr. Affleck, and then I will be through.

You have testified here now, for some considerable length, about various practices you have had in your
34909 company of—over a period of years.

I would like to ask you another question, whether if with reference to any of these matters you have testified about, have you agreed with your competitors you would follow those practices, at any time?

A. No.

Q. Had you any moral or legal obligation to your competitors?

A. No.

Q. And was your action entirely determined by your own good judgment and that of your fellow officials?

A. Yes.

Mr. Hershberger: I think that is all.

Trial Examiner Norwood: Cross-examination.

Mr. Hershberger: Oh, I am sorry. I find I have a few exhibits in which Mr. Affleck was mentioned. I had them at the bottom of my file. I wonder if I could ask a few questions about those?

Trial Examiner Norwood: Go ahead.

By Mr. Hershberger:

Q. I would like to show you, Mr. Affleck, a Federal Trade Exhibit No. 1043-EEE.

Trial Examiner Norwood: Is that something he had something to do with?

Mr. Hershberger: Mentioned in.

By Mr. Hershberger:

34910 Q. This exhibit purports to be a letter from J. L. Eyseman to R. N. Collier.

A. Is this the second page of it?

Q. This is the second page; and the second paragraph of that letter—the third paragraph of that letter states, in substance, that Mr. Eyesman had called upon you in Chicago, had a talk with you, and that you had; and that you were willing to discontinue the use of trucks or add a differential if other companies were willing to do so.

Do you remember a conversation with Mr. Eyesman about the date indicated?

A. Yes.

Q. Tell us about it, if you will, please?

A. Mr. Eyesman called—and I presume he called with the men mentioned here, although I don't remember them—and said that the—as I recall—that the railroads disliked to see the loss of traffic from the rails to trucks, and that he was there to induce us to discontinue trucking.

Q. What did you tell him?

A. This letter from him to Mr. Collier says that I said that if other manufacturers were willing to discontinue the use of trucks, or put in a fifteen cent differential, I would be—I was willing to cooperate.

I am quite sure that Mr. Eyesman misquoted me
34911 there. There are locations where we have been loading cement on trucks right along, for many, many years, and it works right along, no trouble, and there would be no occasion for us to discontinue trucking at those points.

The other points where trouble was consistently rising, I think I did indicate to him if competitors discontinued trucking, and we found out about it, or if they put a fifteen cent differential on trucking and we found out about that, we would go along with that.

He quotes—

Q. Did you mean by that—

A. (Continuing.) —Me as having said I would cooperate. I certainly didn't indicate I would enter into an agreement to do it. If I were entering into an agreement, I wouldn't need the instrumentality of Mr. Eyesman and whoever was with him to effect an agreement.

Q. I show you another exhibit, Federal Trade Commission's Exhibit No. 340, being a letter from Edmund C. Eckel to Dr. Morgan, which makes statement in substance, to the effect you told Mr. Eckel uneconomic cement plants ought to be be permitted to survive and make profits, or words to that effect?

Will you state whether you did have a conversation with Mr. Eckel about it at the time indicated, and whether he correctly interpreted or stated what you said to him?

34912 A. Yes, I remember this call. I presume the date is correct. I had contact in the past previously

with Mr. Eckel, and considered this as just a casual call as he went from the east out to California, but when Mr. Eckel says that in the course of the talk, "Affleck spoke of idle capacity and made it clear he still hopes to hold prices high enough to permit the poorest and worst run of mill to make money," I emphatically did not make any such statement.

Q. Does the statement—

A. I never had any such—

Trial Examiner Norwood: Did you indicate anything from which he could imply that?

The Witness: I don't think so. I never entertained any idea or thought of holding price high enough to let the poorest and worst mills in the business, and enabling them to make anything; that would be preposterous.

History shows there has been a succession of cement plants passing out of business during the last forty years that I have been in the business; quite a long string of them.

By Mr. Hershberger:

Q. I call your attention to Federal Trade Commission's Exhibit 418-A being a letter from S. T. Crapo, of
34913 the Huron Portland Cement Comany to you, July 9, 1935, and I would like to have you take time to read that letter and then I will ask you a question.

A. Read this all the way?

Q. Yes.

A. Four pages?

Q. Glance over it so that you will know all about it before I ask you.

A. You don't mean, read it aloud?

Q. I want to know if you replied to this letter.

Trial Examiner Norwood: Is this a letter to him?

Mr. Hershberger. To Affleck, yes.

Mr. Wooden: What is the year?

Mr. Hershberger: July 29, 1935.

The Witness: 1936.

Mr. Wooden: I thought it was six.

The Witness: Yes, I remember this letter very well.

By Mr. Hershberger:

Q. Did you give Mr. Crapo any advice on the subject he asked about?

A. I did not. I never replied to this letter.

Q. Did you take any action with respect to it?

A. No. This letter came in a month after it had
34914 been announced I was retiring, and I didn't feel it was my problem.

Q. What meeting does he refer to there in the early part of the letter, perhaps in Paragraph 1.

A. The first paragraph. Mr. Crapo was a member of the Federal Reserve Bank Board of Chicago. I think they had a meeting once a month which he attended. It was right across the street from my office, and it was almost a habit of his, when he got through with the meeting across the street, to come over and visit with me, until his train left for Detroit, maybe, a half an hour or an hour or two hours after the meeting was over, and he visited with me until it left.

He was a delightful man, somewhat older than I was, and I found his conversation quite interesting, and encouraged him to come there and talk.

Q. That is the meeting which he referred to?

A. July 24, Friday, I think Friday—their meetings were on Friday, I think.

He simply put in writing here presumably what he had told me during his visit; namely, that there was a controversy on, not one in which we were involved, but one in which his company, the Huron and the Wabash Company were involved, and the Aetna.

Q. You already stated you took no action and gave no advice?

34915 A. Took no action. There was nothing I could do anything about, or would have done anything about if I could.

Mr. Hershberger: I think that is all, Mr. Wooden.

Trial Examiner Norwood: Cross-examine.

Cross-Examination by Mr. Wooden.

Q. Mr. Affleck, referring to this last subject, what did Mr. Crapo tell you about the problems they were having with Wabash and Aetna?

A. As I remember, Mr. Norwood, the Aetna company had come down into Indiana and taken some business.

Q. Are you telling us what you got from the conversation with Mr. Crapo, or giving us some general understanding based on some other sources?

A. I remember something about the circumstances. And it was the burden—

Q. I am asking you only about the conversation now.

A. Yes, I think that was—that is what he mentions in this letter, so I assume that in his letter, he is following up what he discussed with me in the conversation.

It was an irritating situation over there of several months or a year's standing, in which the—

Q. Well, I am asking you to describe the conversation you had with Mr. Crapo about that subject.

A. Well, Mr. Norwood, I couldn't remember a
34916 thing of the details of the conversation, except if this was—what year—four years ago?

Q. 1936.

A. As I say, he had been in the habit of dropping in there pretty regularly once a month, and the conversation covered quite a range of subjects, politics, economics, reminiscent and otherwise, and I am going by that letter which refreshes my memory as to what the burden of a good part of his conversation was; namely, the action of one of the companies in reducing the price in a portion of Michigan.

Q. The Aetna Company?

A. No, the company that he complained of was the Wabash.

Q. That was the Wabash putting in a base?

A. Yes.

Q. That applied to a portion of Michigan?

A. Yes.

Q. Was anyone else present at the conversation between you and Mr. Affleck—

A. No.

Q. —and Mr. Crapo?

A. No.

Q. Did you inform Mr. Crapo that Mr. Stone had been over to Detroit?

A. No.

34917 Q. Now, did you have a conversation with Major Eckel?

A. Yes.

Q. Will you describe as near as you can what Mr. Eckel said to you and what you said to him on that occasion?

A. Well, that is quite a while ago. I can't remember any of the details, Mr. Wooden.

Q. Did you discuss the subject of excess capacity?
A. I don't remember whether we did now or not.
Q. Did you discuss the subject that Major Eckel describes in his letter?
A. There may have been some reference—let's see, what year was that, '36?
Q. '34.
A. '34?
Mr. Hershberger: '33 or four, let me get that.
The Witness: There may have been some reference to excess capacity. Capacity which had been wholly employed eight or ten years before, but which was partly idle at that time.
By Mr. Wooden:
Q. Did you discuss the subject with reference to the relation of the TVA purchases?
A. We may have touched on that.
Q. You knew Major Eckel as being connected with the TVA at the time?
34916 A. Yes, of course.
Q. Did Major Eckel make the remark that he describes in his letter as having been made by him to you, that you would have 1929 conditions repeated?
A. I don't remember. Is that in the letter I just saw?
Q. I think so.
Mr. Hershberger: Is it all right for me to hand him the exhibit?
Mr. Wooden: Surely, surely.
The Witness: Oh, yes. "Or else we will be back again."
By Mr. Wooden:
Q. Did Major Eckel make some—
A. I—
Q. —Remarks—
A. I wouldn't—
Q. —About—
A. Deny that he said that.
Q. Now, with regard to this visit of Mr. Eyesman of the Pennsylvania Railroad, do you understand that Mr. Eyesman was calling on other cement manufacturers about the same subject?
A. I think he was. I think he—
Q. Did he tell you that he had already seen some of them?

A. The railroads, as I understand, as I said a moment ago, had been losing a lot of tonnage which was going off the railroads by truck, and they were very much concerned about it, and I think they had had some conferences and they were undertaking to bring about a discontinuation or reduction in trucking in their own interest.

Q. Did he tell you he had already seen some cement manufacturers?

A. I don't remember, Mr. Wooden.

Q. Did he tell you he was expecting to see some more?

A. I don't remember.

Q. Now, as I understand, you have been connected with the Universal Atlas and its predecessor, the Universal Company—

Mr. Hershberger: It wasn't the predecessor. It was the same company.

Mr. Wooden: All right.

By Mr. Wooden:

Q. And with the Universal, ever since the Universal was incorporated in 1906; is that correct?

A. Yes.

Q. Before it was incorporated, was it in—was it not a department of the Illinois Steel Company?

A. Operated as the cement department, Illinois Steel Company.

Q. And—

A. From 1896.

34920 Q. Until 1906; is that right?

A. Yes, ten years.

Q. Were you connected with that department?

A. Yes.

Q. Prior to the incorporation of it?

A. Yes.

Q. And over what period of time were you—

A. Ten years.

Q. And what was your connection with the cement department of the Illinois Steel Company, what was your status, or the nature of your position?

A. From the beginning, 1896?

Q. Yes.

A. I—the—I entered the employ as a stenographer, and later clerk, and salesman.

Q. What was your position at the time the cement department was incorporated?

A. My title was general sales agent.

Q. How long?

A. Corresponding with sales manager.

Q. How long had you held that position at that time?

A. I am afraid I have answered that wrong. What was the question?

Trial Examiner Norwood: Read the question.

(The question referred to was read by the reporter.)

34921 The Witness: Prior to the incorporation, I had no title. I was simply—I don't think I did,—head salesman. After incorporation, my title was general sales agent.

By Mr. Wooden:

Q. How long had you been head salesman in the cement department?

A. Since 1903. I don't think I had a title from 1903 to 1906. We were very small in 1903. Only had four or five salesmen. Just expanding—beginning to expand.

Q. Now, you have testified that one reason you sell at delivered prices is because the customer, or your customers want delivered prices; that is correct, isn't it?

A. Yes.

Q. Isn't one reason also that you want to be able to meet competition of your competitors at the destination point?

A. That, I think, follows, Mr. Wooden.

Q. I beg your pardon?

A. I think that follows naturally. We couldn't sell anything at destination if we didn't meet.

Q. And by meeting competition of competition of competitors at destination point, you mean—I understand from your direct testimony, your mean making your delivered prices the same as those of your competitors?

34922 A. Yes.

Q. Do you mean to say that when your customers want delivered prices that they want the delivered prices of all cement manufacturers to be the same?

A. Our customers being, as I said earlier, nearly all dealers, they recognize the inevitability of uniformity at any given place of delivery.

They are quite satisfied. Each dealer in a town like

Harrisburg, or Peoria, would like very well if he could buy his cement from a supplier at less than anybody else could. But these dealers all recognize that it is just a practical impossibility, physically and every other way, for any one dealer to get a lower price than all the rest of them.

It would necessarily follow every one of them would get a less price than each other, and that means—what do you call it—reductio ad absurdum.

Q. I do not understand your statement that each of your dealers wants to buy at the lowest dealer's price, and yet you say your dealers collectively want the delivered price to be the same?

A. They are satisfied if they—they are all satisfied, I think I can say reasonably well satisfied at least, if they can all be sure they are not paying more than somebody else is.

34923 On a standard commodity, bear in mind, Mr. Wooden, that automatically comes down to a uniform level.

Q. In other words, as I understand it, your dealers don't want to have one of them buying at a lower delivered price in the same—

A. Correct.

Q. —competitive area than the other?

A. Correct.

Q. Do you think it is your duty to prevent one dealer getting cement at less than another at a delivered point?

A. No, it is not. It is not our duty, but is our duty to our stockholders not to sell our products at a lower price than our competitors sell it.

Q. Haven't there been some times when dealers, at the same destination, were buying at different delivered prices?

A. Oh, yes, yes.

Q. When was that?

A. During these periods of demoralization.

Q. 1931-'32?

A. Yes.

Q. In other words, the—

A. Yes, correct.

Q. In other words, demoralization was not limited to large orders like state highway jobs?

A. Yes.

34924 Q. But extended to dealers, also?

A. Yes. The dealer trade wasn't subject to so much irregularity as the large contracts. The dealer trade, I think, usually got a lower price by reason of lowering the price base.

In other words, when cutting and demoralization had become pretty far flung and widespread, it became inconsistent to hold a price base that was substantially out of line with the prevailing—

Q. Have you finished—

A. —with the prevailing transactions.

Q. Do you mean to say that even in that period, the dealers were paying the same prices, only that the level kept dropping and dropping?

A. Pretty much on the dealers' miscellaneous business. Pretty completely.

Q. That wasn't the case on the large orders?

A. Large orders, or the orders that got the cut, secret price that people tried to cover up and hide, but never very successfully.

Q. You are speaking of large private orders. There were some large public bids, were there not?

A. Yes. I meant the word private to mean—to mean private prices, secret prices.

Q. The public purchases, though, were not private?

34925 A. No. Some of them were very large.

Q. You spoke of the necessity of having your dealers in places like Chicago and large centers like that, on the same basis of price because they might be right across the street from each other, and that unless you had a zone, you would have them buying at different prices?

A. Yes.

Q. Isn't the same thing true even when you have a zone, that you have some dealer just outside that zone that is buying a different—is buying at a different price than the one that is just inside the zone?

A. That may be the case, but when you get out to the boundary of the zone, the population is rather sparse and there is not much trouble there. Use of cement there is relatively small.

Q. Take Chicago. You get outside of that area there where the delivery charges are all the same, you have some

dealers, did you not, that are in competition with dealers just inside the—

A. I think that—

Q. —Zone?

A. —The delivered price at the—I am depending on memory to a considerable extent, but I think the delivered price at the Chicago zone, to use an illustration, merges pretty gradually into the delivered price prevailing outside the zone. Don't think there is any abrupt drop or
34926 up at the—outside the zone.

Q. But there is some point there, where there is a difference just inside and just outside?

A. There may be a little, but it wouldn't amount to anything, that is my recollection.

Q. Unless a dealer wanted to use it in his competition —he might take advantage—

A. I forget those figures. The Chicago zone is quite a complicated zone with rather irregular boundaries, but I am pretty sure that the price within the Chicago zone, so called, merge gradually, and easily, into the price prevailing outside.

Q. I thought your Chicago zone prices were all the same within the Chicago zone?

A. Yes.

Q. What do you mean by merging them gradually?

A. I mean that our prices in the Chicago zone, say, of two dollars a barrel, would merge into the delivered price outside the zone, where you might have two dollars and three or two dollars and four or five cents.

Wouldn't be an abrupt change either up or down between the delivered price in the zone and immediately outside the zone.

Is that what you—

Q. Perhaps I am wrong. Are your delivered
34927 prices in the Chicago zone the same throughout the zone?

A. Yes. We take an average or mean, or what might be called an arbitrary freight rate, and add that to our price base.

Q. Is that twenty-nine cents?

A. I forget what it is.

Q. You spoke of this great irregularity of prices in 1931 and 1932 as being countrywide. Did you mean that

liberally that it is countrywide, including the Pacific Coast and mountain states, and all?

A. I should have qualified that, perhaps. We don't do any business in standard gray cement on the Pacific coast. Our boundary is the Rocky Mountains.

They have had different conditions. I should have said east of the Rockies, where we do business.

My answer was in error.

Q. Isn't it a fact during that period the prices in Texas, for instance, did not show this irregularity that was shown elsewhere?

A. In 1931, two, and three?

Q. Yes.

A. Well, that is a few years ago, but if my memory doesn't fail completely, I think Texas was pretty badly demoralized.

Q. Didn't the base price in Texas hold up?

34928 A. Oh, they held up pretty well but that did not represent anything.

Q. Well, you mean the secret prices were in Texas—

A. Yes.

Q. —Without affecting the base price?

A. Yes.

Q. But in the other sections of the west and middle west—I should say middle west, and east, and south, the base prices themselves were affected; that's right, isn't it?

A. That is my recollection.

Q. And how were the base prices in the Mountain states? Didn't they stay up pretty well?

A. Well, as I said before, we—our marketing territory does not—I said it was east of the mountains. It does not get into the mountain territory, so what I might say about how prices there were maintained during that period, would be inaccurate.

Q. You have no particular or general knowledge?

A. My impression is that those prices were better maintained in the mountains—in the mountain territory than they were east of it, but that is merely hearsay.

Q. In general, would you say that the irregularity of prices occurred in the districts where relations between capacity and volume of business was least favorable?

A. Where there was the greatest idle capacity.

34929 Q. Yes, in proportion to the volume of business available in that section.

A. I don't believe, Mr. Wooden, that had much to do with it.

Q. As a matter of fact, the—

A. May have. But if the—if that were the case, I think it was rather a coincidence rather than cause.

Q. Isn't it a fact the capacity in the mountain states and in Texas, was less in proportion to the volume than in these other sections of the middle west and east?

A. Perhaps so, but I don't think that necessarily follows that the cause of the—

Trial Examiner Norwood: He didn't ask you for the cause. He asked you for the facts.

By Mr. Wooden:

Q. He said he thought that was probably the case. I will ask you then the further question: isn't that the logical view to take of it, that the prices would be affected where the capacity was greatest in proportion to the volume of business available?

A. That seems plausible on its face, but I don't think that necessarily follows.

Q. And there are other factors, of course, about that?

A. In the cement industry—our company in the period which we are talking about had a lot of idle capacity, 34930 but we could very perfectly see and see very clearly that a reduction in price would not employ our idle capacity.

Reduction in price in the Chicago area, for instance, would not offset this shrinkage in building permits from three hundred million down to three million.

We simply regarded our idle capacity as our bad luck and we hoped for a time when idle capacity would come into use.

Q. But other cement manufacturers did not see it just your way, did they?

A. Oh, I think they all—in the course of time all see the perfect futility of trying to keep going by cutting the price because they couldn't get away with it.

Q. In the course of time?

A. The first two or three years of the—the first two or three years of 1930's, began in 1929 and more in 1930, very badly in 1931, and by that time they had learned a lesson and saw pretty plainly the futility of trying to meet a situation by cutting the price. That was the situation. So we had a rising price along in 1932, I think, or 1933.

Q. But you said—

A. And, curiously enough, as the price rose the volume of business rose.

Q. You said this morning that this price demoralization in 1931 and 1932 was brought about in part by the efforts of some manufacturers to get more than their share of the reduced volume of business?

34931

A. Yes, I said in effect, that I saw a period of—

Q. So they didn't see—

A. —Rising—I beg your pardon?

Q. They didn't see the issue as you did. They didn't see it as you said you saw it?

A. Not until they had gone into or three two or three years of grief. They saw it then.

Q. What did you mean by saying some manufacturers made an effort to get more than their share of this reduced volume of business? What was their share?

A. By secret price cuts.

Q. That is what you meant, is it, the method?

A. Well, with those price cuts—

Q. What was their share?

A. Well, by their share, I mean just, arithmetically, a reduction in—from the previous year corresponding with the reduction.

Q. You mean the percentage of the whole?

A. The percentage of the whole, yes.

Q. In other words, they tried to increase their percentage of the total business?

A. Increase their percentage of the total business.

34932

Q. Of the total business?

A. Of the total business. When the total was coming down actually, absolutely.

Q. Did you see anything wrong about a manufacturer trying to increase his percentage of total business when the volume was coming down or at any other time?

A. I do not see anything wrong about it, but the unfortunate thing about it is—

Q. They ought to do it by lowering prices?

A. It is futile because, if he gets away with it, it is only for a brief period.

Q. You say there is nothing wrong about him attempting to increase his percentage by lowering the price?

A. Nothing wrong at all.

Q. Just a second.

A. It is futile, yes.

Q. Even you—in other words—

A. If I could have gotten a bigger percentage by lowering prices, I would have done it and I wouldn't have thought anything about its being wrong, but I wouldn't have gotten away with it more than momentarily.

Q. You don't think a competitor ought to attempt to increase his percentage of the total volume of business by lowering price?

A. You asked whether I think he ought not attempt to.

34933 If he is my competitor, I would say he ought not to attempt to increase his percentage; but if it is myself, I think I ought to attempt to increase my percentage.

Q. As a matter of fact, however you thought about it you didn't attempt to increase your percentage?

A. No.

Q. So your practice was the same?

A. We formed—

Q. Your practice was the same no matter what you thought your competitors' practices were?

A. Well, we had had the rapid shrinkage in the selling price, and we went along with it, of course, as we had to do and curtailed our operations drastically and waited for a better time.

Q. You said—

A. We know perfectly well we couldn't increase our percentage of the total. Didn't try to.

Q. You think it is futile for competitors to attempt to change their percentage of the total business that is available to the whole group?

A. I don't think my opinion as to whether it was futile or not is important. It just is futile.

Q. Well, why?

A. Because he can't get away with it.

Q. In other words, you don't think it is possible 34934 for a concern that has ten per cent. of the business this year or last year to make it fifteen per cent. this year?

A. I didn't mean to convey that idea. The fact of the matter is, our percentage of the total underwent quite a

severe shrinkage. We didn't get our percentage in 1931 or two, and others got more.

Q. And others got more?

A. So I should qualify that by saying it wasn't entirely futile. They could get by with a certain increase in percentage for a certain time but they soon ran out. I am glad you corrected me on that. I wouldn't want the—

Trial Examiner Norwood: They could do that with the method of giving secret prices?

The Witness: The secret really does not remain secret very long.

By Mr. Wooden:

Q. You said this morning on direct that during this 1931-'32 period, that prices remained just as uniform but only at lower levels.

Now, as a matter of fact, while they were in this process of dropping from one level to the next lower level and so on down, they were not even uniform during that period?

A. Oh, there was a variation there, yes.

Q. As a matter of fact, it was that variation that 34935 caused the further drops?

A. The price cutting of course was what brought it down to lower and lower level.

Q. Lower and lower level successively?

A. Yes. Yes, I didn't mean to say constantly on a decline that every moment of that period they were getting still lower, but I did try to convey when they got the—when they got to the bottom and the price was ruinously low, they were just as uniform as when they were profitable.

Q. In your view of the things and growing out of your experience, did you have some test in your mind of the reasonableness of prices other than that growing out of competition?

A. Reasonableness of price?

Q. Yes.

A. Of course, the conventional test of reasonableness of price is whether it yields a fair return on the investment.

Q. Well, now, you don't consider the test of competition as one of the tests of reasonableness of price; is that right?

A. I don't quite understand the question, Mr. Wooden.

Q. Well, taking up your own answer, do you want a given price level—isn't it reasonable for one concern and

not reasonable for another to sell at the same price, judging from the standpoint of return on investment?

34936 A. If I understand your question correctly, certain business might yield a fair return to the company and not a fair return to another company.

Q. At the same price level?

A. At the same price level, yes.

Q. So, your test there is one that couldn't be applied to both companies?

A. I think, Mr. Wooden, you would have to take the total business of the two companies.

Q. You mean, their average, then, so to speak?

A. For instance, the total business of A company and average it, and then the total business of the other companies, and average it.

Q. So that the—

A. We—

Q. —The price level—

A. —We—. There is no denying our net return at the mill varies. Some business—would perhaps yield us a return which was unreasonably low.

Q. Let me ask you this—

A. But we average that out with some business that yields us a better return, and if we average it all, and that is a fair return, we think we are in the clear.

Q. Do you accept competition as a fair test of the

34937 reasonableness of price?

A. I don't think I quite understand how competition would be a test of reasonableness of price.

Q. Did you ever read or consider the theory of competition as discussed by economists and ever consider it from that standpoint, as to whether competition is the basis for determining reasonableness of price?

A. Well, I have read some books on economics. I am not an economist and don't pretend to be a profound economic scholar or expert.

Q. I didn't ask you that.

A. But if a competitor—if a competitive situation exists which yields one seller in that situation a reasonable return, or fair return, and it does not yield someone else a fair return, too, that is his bad luck.

Q. Do you think—

A. It is your question—your question is that; competi-

tion a test of reasonableness or not. Was that the word, "reasonableness"?

Q. Yes, that's right. That's right.

A. I am afraid I will have to say I don't know.

Q. I believe your position is that competition exists and price competition exists even though and even when delivered prices of different mills are identical?

A. Absolutely, Mr. Wooden.

34938 Q. Does competition exist when the delivered prices are not the same?

A. Yes.

Q. Does it exist in greater or less degree when they are not the same?

A. I don't think competition can be measured by degree. It is either competitive or not competitive.

Q. Didn't you think there was quite a difference in degree in 1931 and 1932?

A. Well, the word "degree" has a technical connotation, it seems to me. It is competitive or not competitive.

Q. You told—

A. Excuse me.

Q. Go ahead. You told me there is competition when delivered prices are the same, and competition when the delivered prices are different, and that certainly calls for my question whether the competition is greater in degree in one case than in the other?

A. My answer to that is that if—if I am trying to get some business that someone else is trying to get, and I make the same price that he does and get the business, I have been in competition with him and successful competition.

If I cut the price and offer my goods at a less price than he does and get the business, I have also been in successful competition with him. And, reverse the thing

34939 and you have the vice versa order. But it is competition whether the prices are the same or not.

If two or more people are trying to get the same thing, they are competing for it.

Q. Well, that is just saying over again in other words what you have already said. It was competition in both cases.

A. Yes.

Q. Again asking for an answer to my question as to

whether competition is greater in cases where prices are different than in cases where they are the same?

A. If my price is two dollars and some one else's was a dollar and ninety cents, I would say that was severe competition; but, if I am in a position to meet that price and make a price of one dollar and ninety cents, I maintain that you have—you may reverse that vice versa on the thing.

Price is two dollars and I meet two—price is a dollar and ninety cents, his price a dollar and ninety cents and mine is two dollars, I meet his price as soon as I could find out what it is. It is still competition. My price is equal to his and not lower than his; there is competition. I have met his price.

Trial Examiner Norwood: Is that price competition?

34940 The Witness: Oh, yes, your Honor, I would say emphatically that is price competition and nothing else but.

By Mr. Wooden:

Q. You can't tell me which one is the greater degree of price competition?

A. I don't quite get where the word "degree" fits into this.

Q. Simply this: Was there more price competition—

A. There is more competition if the difference in price is ten cents than if it is two cents or one cent or a half cent.

Q. And, by the same token, more than if it is the same?

A. Of course. Yes, that is the degree.

Q. That is what I am talking about. I believe you made some statement on direct that you got into a competitive situation like that, there was no telling as to which competitor was to be lower in price at any particular destination?

Is that correct?

A. That might be correct, I think.

Q. Wouldn't you think that the competitor whose mill was so close to the destination that he had a much lower freight rate than another, was a factor to be considered in which one should be normally and naturally lower in that—at that destination?

34941 A. If the mill with the lower freight rate is low and—at the point of destination—and the mills that are distant from the point of destination do not meet his

price, of course, he gets the business. But if the net return of a remote company is adequate and he meets the delivered price, he may get the business, and that is competition

Q. Aren't you willing to recognize the competitor that has the advantage over a competitor and is willing to use that advantage, should be the one to get the business?

A. Depends on whose ox is gored.

Q. Yes, it does.

A. I would like him to stay out of my territory, but I wouldn't like him to keep me out of his territory.

Q. But you do not even act yourself, upon the theory when you have an advantage you ought to undersell your competitor at destination, do you?

A. I think I am proud to say that, with the exception of a few periods of unusual conditions, we have maintained our price. We publish our price to the world and we stick to it.

Q. To the extent you and your competitors both adhere to their announced base prices and figure freight from the applicable base to destination, any advantages or disadvantages that any of them may possess are all merged,
34942 are they not, and offset in that common destination price?

A. Well, that is up to the customer to select.

Q. Make a choice?

A. The supplier, if he likes the salesman, that may be the consideration, or the service is a little better or he likes the situation. Been a long time customer, maybe. Customers tend to persist with the supplier a long time, hard to pry out. The customer of the dealer and his customers, in turn, have been in the habit of getting a certain colored brand and they would like to keep on.

Q. But all advantages and disadvantages, as far as they reflect themselves in price, are waived out in that common, identical delivered price then, are they not?

A. On the contrary, I think it's an advantage in a given locality to be able to get a number of brands from a number of different sources.

Q. At the same—

A. Without paying any premium for any one of—of them.

Q. And at the same price?

A. At the same price.

Q. Do you see anything wrong, fallacious about the

concept of one competitor being low at one time in a given locality, and on a given piece of business, and the next time some other competitor being low, the next time a third competitor being low.

34943 A. Do you refer now to the self-same contract or—

Q. Take any kind of a sale you want, large or small.

A. And what was the question, please?

Trial Examiner Norwood: Read it.

(The question referred to was read by the reporter.)

By Mr. Wooden:

Q. Let me add another word; wrong or fallacious or unsound.

A. Do I see anything wrong or fallacious or unsound?

Trial Examiner Norwood: About that condition.

The Witness: About that condition. One, two, three, this fellow and that fellow and the other fellow. I don't quite see—I am—I may be pretty dumb, but I don't quite see how the question ties in to the subject about which the question is asked.

Would you illustrate that a little more clearly?

By Mr. Wooden:

Q. Well, you have been giving us your conceptions of competition and you are saying that the identical delivered price is competitive, and I am asking you this question in that connection.

Trial Examiner Norwood: Do you mean wrong, or fallacious, or unsound from an economic standpoint?

By Mr. Wooden:

34944 Q. Or a business standpoint, or any standpoint you want to take.

A. You—you said the first time, the second time, and third time. Are those periods remote from each other, or simultaneous or a few days or months or weeks apart, or the same day?

Q. Taken any way you like, but say—take them a week apart at the same destination.

A. Well, excepting at a time of serious turmoil, if the periods are close together, the probability is that these prices would become uniform, and that the price named by the No. 1 fellow would be met—

Q. Suppose next time—

A. The second time and the third time rather than cut below the second and third time.

Q. Well, do you see anything unsound or fallacious about it—

A. Oh, no.

Q. —If the second time they went below what the first man did?

A. I wouldn't say I saw anything wrong about it, or criminal or anything of that sort, but I might question the wisdom of the second and third competitor cutting below instead of merely meeting what the first—

Q. That is what I am trying to get at, what your 34945 conception of it is.

A. I question the wisdom of it from the long point of view.

Trial Examiner Norwood: We will have a five minute recess.

(A five-minute recess was taken.)

Trial Examiner Norwood: Proceed.

By Mr. Wooden:

Q. Mr. Affleck, reverting to your testimony a few minutes ago, to the effect that when one competitor was one cent or ten cent below his competitors at a given time and place that that was more competition than if they were all identical.

Do you consider the making of identical delivered prices in the light of being perfect competition?

A. Yes.

Q. Then, is this instance or example of lack of identity imperfect competition or is it—or just what is it?

A. You used the word "more" a while ago. I don't think quantity is—

Q. Well, I substitute that for the word "degree" which didn't seem to—

A. Correct. Degree.

Q. I thought you used the word "more."

A. Well, it's—the word perfect, I said, yes, per- 34946 fect competition. Well, it's—it's competition. If prices are identical and two or more competitors are trying to get the same order. If prices are different, it's still competition, but instead of degree or more or—

Q. Well, put it—

A. Perfect tense, it's—it's just a difference of price.

Use of the word "perfect" as applied to competition or the—as a number of competitors increase you have more competition. To use the word rather loosely.

Then if there are only two competitors and one is there with a price a cent lower or ten cents lower, if he's ten cents lower, that might be said to be more competitive. But certainly, if two people are trying to get the business at the same price, or more people are trying to get the business at the same price, identical and uniform price, they are in competition, as I see it.

Q. Would you say that if there were twice as many mills making cement without an increasing volume to correspond with that increased capacity, and they were all making the same delivered prices, that there would be more competition of less?

A. Certainly wouldn't be less, but whether there would be more they'd certainly be competing. There wouldn't be any less competition. Whether there would be more or not, is a matter of how you would define the word
34947 more. This uniformity of price, if I may continue a moment, is a—is a thing not invented and forced upon the public by the cement makers. It's a—it's a thing that is brought about completely, as I see the picture, by the cement buyers. They will not pay more for anybody's cement than they can buy cement for, and that tends to bring it down to a level.

Q. You don't mean to say, though, that you have no purposes of your own to serve in the making of identical delivered prices on the basing point system?

A. Oh, no, I wouldn't deny that at all. On the contrary, I would say that I was committing suicide if I didn't do that, because—

Q. And—

A. On—Long experience has shown me that if my—if my competition takes the shape of a lower price of my commodity at the point of delivery, then the market price there, the market price will quickly become, under ordinary conditions that I have named, or the price of that some competitor has named.

Q. Well, if—

A. So I can't deny that I have a motive in not getting the price, the general market price down.

Q. In other words—

A. Provided it's on a fair level. And I think it has been.

34948 Q. You have purposes of your own there that you'd like to serve regardless of whether your customers or dealers have purposes of their own that they arrived—that they served by it?

A. No denying that, Mr. Wooden. Self preservation.

Q. Now, you say that customers will not pay more for one brand than another.

Isn't it a fact that the quality of different brands of standard cement vary?

A. There are certain characteristics that differ slightly between different brands of cement. Color may vary slightly, but—

Q. Well, isn't there a difference in the tensile strength of various cements under various conditions?

A. There is some difference but the specifications are pretty rigid, and all that the customer requires is that we deliver cement to him that conforms to the specifications that are applicable on that particular work.

Q. Those are minimum specifications?

A. Those are minimum specifications. And in order to be sure not to get into trouble, the cement-maker overshoots the mark some.

Q. And the difference—

A. But the buyer will not pay any more, I don't think, except perhaps in a very few cases, for a cement that

34949 overshoots the mark a great deal than for one that overshoots it just enough to be safe.

Q. The dealers don't really know how much a particular brand of cement overshoots the mark, do they?

A. They are not generally, I don't think; very much interested, only the—

Q. None but informed dealers are not, are they?

A. They are not interested.

Q. And they are not informed, are they, as to what—

A. Not informed, probably, most of them. The engineer or architect having responsible charge of the job is the man that is informed. It's his business, professional business to be informed, and he is very well informed.

Q. Your standard cement exceeds the minimum specifications?

A. Yes.

Q. By how much on—

A. I can't tell you that, Mr. Wooden.

Q. Has Universal-Atlas—

A. Sufficient margin, I should say, of course.

Q. Has Universal-Atlas ever advertised that its standard cement exceeds the minimum specifications?

A. I don't think so.

Q. Why not, if it's a fact?

A. Well, that—I don't think that would be—I don't think that would be good advertising, don't think
34950 that would be—it wouldn't get us anything.

Q. Well,—

A. I think some companies have advertised: "Our brand far exceeds specifications." And I never could see where that got them much. You can easily see, Mr. Wooden, that if advertising that the product exceeded specifications became very general, next thing that would happen would be that the—the various societies and Government authorities that would have to do with specifications, and so on, would raise the specifications.

Q. And—

A. And then we'd be right back where we were before.

Q. And then some of the companies with the lower quality might have difficulty in meeting the increased standard?

A. As a matter of fact, over the last few years, ten or fifteen or more, the specification writers have, perhaps properly, engaged in stepping up the requirements from time to time, a little here and a little there, until it's a great deal more difficult to make cement in some mills than it was fifteen or twenty years ago. In spite of which, I don't think the price realized has gone up any. The product is better.

Q. Why wouldn't it be—

A. At the same price.

34951 Q. Why wouldn't it be a good move for a company with standard cement that substantially exceeded the minimum specifications, to advertise the fact and ask a little more for the product because of that?

A. I don't think they could get a penny more, Mr. Wooden.

Q. Even though they—

A. No.

Q. —It was admittedly better?

A. No, no, the buyer is usually not the man that—where the cement goes through a dealer, the dealer wouldn't be interested in that. The user, if he has highly trained engineers, might indicate a preference on examination and test of the cement, for a cement that was higher than the specification.

Q. You don't think the—

A. But generally speaking, cement and concrete made with cement so far exceeds the requirements of—if the way of loading on floors and otherwise, that an increase in the strength in excess by specifications is of negligible importance.

Trial Examiner Norwood: Well, if there were a variety of strengths, qualities, that would affect price structure and price methods, would it not?

The Witness: I don't think so, Mr. e—your Honor.

By Mr. Wooden:

34952 Q. Don't you think—

Pardon me. Are you through?

Trial Examiner Norwood: Yes.

By Mr. Wooden:

Q. Don't you think that a—

A. The—I might say this, and I think perhaps I should say this, that there are—there are Portland cements that are designated as high early strength Portland cement. As high early strength Portland cement, which is so far out of—beyond the specifications for standard Portland cement. Quite a number of manufacturers now make the high early strength cement that does command a premium of something—I forget what it is. We weren't making that when I was president of the company, but we're making it now at one or two or more of our plants, and I know it commands a premium.

Whether it's twenty-five or fifty cents a barrel, I don't remember.

Q. Well, if that kind of cement with superior qualities commands a premium, why shouldn't a standard cement that is substantially in excess of the minimum specifications command a premium?

A. The high early strength and—the high early strength is very highly—is very finely ground and acts very quickly, so that it acquires a high compression

34953 strength, in a day or two, as compared with four, five or six or seven days.

Q. Isn't this a fact, Mr. Affleck, that if with the variations in the quality of standard cement and its tensile strength and things of that sort, and if that were advertised and widely known, wouldn't that seriously interfere with your getting an identical delivered price?

A. I don't think it would.

Q. With your competitors?

A. I don't think it would.

Q. You don't think it would? You can't see any logic in that viewpoint?

A. Strange to say, Mr. Wooden, while there's logic in it and a degree of reason in it, as a matter of practical operation I don't think that would result. This high early strength cement it—is way out of the—way out of the classification of what is called standard Portland. Now, it's logical to reason that any— it's quite logical, as you indicated, to reason that starting at a given level and increasing in quality up to this high early strength specification, it should carry a gradation in price correspondingly. But as a practical matter, that doesn't work that way. I'm—I've had contacts with engineers and specification writers, and they're quite satisfied—in fact they have written specifications for standard Portland cement
34954 so and for high early strength so. College professors and highly trained experts who have been in—in this thing all their lives, they—they don't distinguish between the standard—that is, they don't have any intermediates between the standard and the high early strengths.

Q. Of course, there is no reason why—

A. Although they might.

Q. There is no reason why a person should pay more for a standard cement that's better quality than another standard cement, when he can get them for the same price, is there?

A. That seems quite logical, but as a matter of practical operation, I don't think that applies. The—well, I guess we've exhausted—.

Q. Now, the same line you say that customers will not pay more for one kind of cement than another. It is true, is it not, that your customers will pay more for domestic cement than for cement—imported cement, I mean? In other words, there is a certain prejudice against imported cement that enables the domestic manufacturer to ask and command a premium, doesn't it?

A. Yes.

Q. And that's not—

A. Prejudice—I'd like to call it patriotism.

Q. Well, I won't make—

34955 Trial Examiner Norwood: Well, there are service considerations, too, are there not?

The Witness: Not—not very much. The importer brings it in and puts it on the dock across the river from New York or Boston, or Miami; and the service that can be obtained on foreign cement is not very bad. Very good, in fact. Their freight rate across the ocean is just about the same as our freight rate from Northampton, a hundred miles away to New York, two dollars a ton.

Their cost of labor is much less.

By Mr. Wooden:

Q. Mr. Affleck, this matter of cross-hauling, that involves and is almost another way of looking at the matter of freight absorption; isn't it?

A. Freight absorption is a phrase, all right; but I think I regard the additional freight involved in what's generally known as cross-hauling, as merely an additional item of expense that comes in along with all the other items of expense; labor, and material, and fuel, and advertising, and selling, and everything else.

Here's some business on which the expense is a little more than some other business.

The freight—freight absorption. In many cases you have profit absorption; profit is wiped out com-
34956 pletely or partially. Freight absorption just comes in—is just another item of expense of competition.

Q. Well, don't you think—

A. Of course, cross-hauling is certainly competition if it is anything, if I—

Q. Competition in the same sense that—

A. Yes.

Q. —Making destination prices identical, is competition, is it?

A. Well, if we cross-haul into the other fellow's territory, make the same price that he makes, we're certainly competing with him, and vice versa.

Q. And isn't cross-hauling most pronounced when there is the greatest amount of freight absorption?

A. Yes. I said a moment ago that cross-hauling was an item of expense; and the—the more cross-hauling, why, of course the greater the expense.

Q. And the greater the amount of the freight absorption, the lower the mill nets?

A. Yes.

Q. Isn't there some way that you can increase your mill net by reducing freight absorption, wouldn't that tend to offset any reduction in volume that might also occur?

Trial Examiner Norwood: Read the question, please.

34957 (The question referred to was read by the reporter.)

The Witness: I don't know, Mr. Wooden.

By Mr. Wooden:

Q. Wouldn't there be a tendency—I am not asking whether it would exactly offset it or more than offset it, but wouldn't there be a tendency to?

A. Well, of course the arithmetic of it is very simple. If we ceased cross-hauling, the net return at our mills would be—would be more.

Whether the increase in net return—but whether the increase in net return we received at our mill would offset the loss on the volume that we would lose, I can't—I can't—

Q. The tendency is there, isn't it?

A. Oh, yes.

Q. Nobody knows, of course, what the—

A. Yes; I overlooked your word "tendency."

Q. —Actual result would be.

A. Yes. But it would subject us—if I may continue—to the greater violence of fluctuation in demand within the territory.

Q. You have that—

A. Lowered by saving a greater territory.

Q. Subject of course to fluctuations in that demand as it now stands, also?

34958 A. Oh, yes, yes.

Q. Of degree. Well, do you have some in the way you price? You have some prices mill net, haven't you, far below the average and some far above? In other words, there is a wide range between the lowest mill net and the highest mill net?

A. Yes.

Q. So the greater—

A. There is a—

Q. Pardon?

A. Your question is there is a wide range. There is a variety, a range. Whether it would probably be called wide or not, I don't know. There is a range.

Q. Well, perhaps you could give us some idea of that. How wide have you known it to be between your lowest mill net and your highest mill net?

A. I don't remember, Mr. Wooden. We—of course—

Q. Has it frequently been as much as fifty cents a barrel?

A. Oh, I'd say almost—I'd say never that much.

Q. Never, in any case?

A. I don't think so.

Q. And to any of your mills?

A. I don't think so. Fifty cents a barrel?

Q. Yes.

34959 A. I don't think we would have shrink our mill net that much. I don't think we would. I don't think we did during our term, although there might have been a case here and there where we did.

Q. Didn't your reports to the Clark-Burns questionnaire show more than fifty cents' difference between your high and low mill net?

A. In a few isolated cases?

Q. Well, whatever it called for, for the months that they called for.

A. It may have, but I'm not quite sure. But that—I'm quite sure a fifty cents shrinkage in net would be quite unusual. That would apply to only a—

Q. Well, you are asking—

A. Either a small amount of business or a very few customers. It may be on some Government business where—where the competition was closer, considerably closer, we would figure out the out-of-pocket expense-producing the cement and getting it on cars, and if the alternative was presented of taking something that would give us volume and employ our men and yield little or nothing, I'd say we'll take that rather than pass it up.

Q. Wouldn't you say this, that the range between the highest and lowest mill nets is greater in the case of a non-basing mill than in the case of a basing mill?

34960 A. Greater in the case of a non-basing mill than in the case of a basing mill? The range is greater at the non-basing mill?

Q. Yes.

A. Then it is—than at the basing mill?

Q. You had the experience—

A. Offhand, I don't think it would be. The non-basing mill, so-called, obviously obtains a higher net price at the mill on its nearby business than the mill that has a price base at its mill. On the other hand, the non-basing mill might reach out into distant territory in the direction of a basing mill and have to shrink its mill net considerably.

Q. Well, that's—

A. But in reply to your question, I'll have to say I don't know.

Q. Well, you had the experience—

A. All depends on the arithmetic of it.

Q. You had the experience of turning your Universal mill from a non-base into a base mill back in—was it about 19— — when was it?

A. Yes, I—I recall.

Q. When—well, didn't that reduce the range in the mill net that you obtained?

A. I don't know. I'm rather stupid and slow in 34961 figuring here. But I—I don't know. We had original—about a 4,000 barrel mill a day at Pittsburgh, just out of Pittsburgh. Got that going in 1908. We enlarged that to about 8,000 barrels a day in 1912.

Q. Meanwhile you were—

A. Prior to 1912 we could make a greater net return at the mill at Pittsburgh, by basing on some distant basing point, principally, Lehigh Valley. But when we got that mill up to a capacity of 8,000 barrels a day, and in the meantime, if I remember correctly, one or two other cement mills built in there or enlarged it or something or other, it seemed obvious that we could not longer hope to—to at the same time get the increased volume which our increased capacity called for, and get the high price that we would get by basing on a large—by basing on a distant large producing center like Lehigh Valley.

Do you follow me?

Q. What do you mean? When you could no longer get the high price, you were referring to your mill net?

A. Yes.

Q. The question I am asking you, though, is whether or not when you changed from the non-base status at Universal to the basing point status, whether that didn't reduce

the range of your mill net; you no longer had this high mill net?

34962 A. I think it did reduce the range.

Q. Well, that is what I am trying to get at.

A. I think it did reduce the range.

Trial Examiner Norwood: Well, did it in effect reduce the delivered prices, too?

The Witness: Yes, it reduced the delivered prices, delivered at destinations, within the nearby radius of Pittsburgh.

Trial Examiner Norwood: And that increased your volume, did it?

The Witness: Oh, it increased the volume, yes. As a matter of fact, the volume was very good along those days. We were right in the '20's, made some money.

By Mr. Wooden:

Q. Well, in consideration of the low mill nets that you have been accustomed to take when you went into so-called freight absorption territory, didn't that necessitate your having your average mill net higher than if you had not gone into that distant territory?

A. I don't think so.

Q. Don't you think it is logical that it would?

A. If we—

Q. In other words, the lower—

A. By getting some business in distant terri-

34963 tories, it's conceivable that we might have the price lower in the local territory.

Q. But assume that you make some distant territory mill nets that are down close to your out-of-pocket cost, you've got to make that up on the higher mill nets elsewhere—

A. Oh, yes, yes.

Q. And therefore, on the average?

A. On the average.

Q. On the average. Now, regarding this excess capacity, I believe you said that there was more excess capacity in the Lehigh Valley district than any other, any other center?

A. That's my impression, Mr. Wooden.

Q. Well,—

A. Or it was so. I—it may have changed in the last four years. I think some of that capacity has been abandoned or dismantled. But I still think it's—

Q. Well, isn't this cross-hauling and freight absorption one method by which the mills in a district like Lehigh Valley seek to escape from the over-capacity that they have in that district?

A. They seek to escape from—

Q. From the effects of it in that district?

A. Yes, seek to—to increase their volume of business, yes. Lehigh Valley, if I remember correctly has, for a long time, shipped more of that—it's fairly a large
34964 percentage, not the majority but—

Q. In other words—

A. A large percentage outside of the area where its distance freight-wise is the lowest.

Q. In other words, the greater the excess capacity in one given locality or district the more urge there is to go into more distant territory?

A. Yes.

Q. And therefore absorbing more freight?

A. Yes.

Q. And therefore creating more cross hauling?

A. That's right. Yes.

Q. Now, in reference to this so-called rigid f. o. b. mill price that you were discussing, what did you mean when you used the term "rigid f. o. b. mill price"?

A. Price f. o. b. mill the same to all customers, without variation.

Q. For how long a time? Was it—was the element of time involved in it?

A. Well, a fairly—fairly long—for a period of time until—lasting until some change in conditions suggested a change in the rigid price.

Q. You didn't consider that the f. o. b. mill price might be changed say, once a week or once a month?

A. No.

34965 Q. That wouldn't be rigid within the meaning that you attach to it?

A. Well, a change once a week would be something unprecedented in the—without much reason, because there are no— no such changes as weekly changes in conditions of demand as a rule.

Q. You say there are no—

A. There might be—there might be some sort of a calamity, or a war, or something of that sort, that would suggest shooting the price up thirty cents a barrel or—

Q. Would you say also that there was no change—
A. But there wouldn't—
Q. —In competitive conditions from week to week?
A. There wouldn't be any—not quite comprehensible to have the—a rigid price on this level for a few days and jump it to this level for a few days, and then drop it back where it was or lower than it was. That—that would be—that would be a very bad thing. There isn't a dealer in the country that would want a violently fluctuating price.
Q. A dealer, you say?
A. Yes.
Q. In other words, it's part of the proposition that—
A. The dealers like stable—they want each dealer to be on an equality as to delivered prices—
34966 Q. They want each dealer to be on an equality as to delivered prices?
A. Dealers like nothing better than stability, except that a dealer that happens to have quite a little cement on hand, feels pretty good about it when the price goes up so that he—he bought right, and he feels disappointed if the price goes down when he has a few bags on hand. But the dealers are generally well satisfied when the prices remain stable.
The stability, I think, is generally recognized as a desirable thing in business.
Q. You think the user of cement also wants the price to remain stable?
A. The ultimate—
Q. Yes.
A. The ultimate owner?
Q. Yes.
A. Well, of course, the ultimate owner or the ultimate consumer, being a human being would like to have the price drop when he's about to buy and then go back where it was when he's got his stuff bought.
Q. Well, do you think that is—
A. But more—more—for society as a whole, I think it can hardly be denied that stability is a desirable situation.
Q. You mean stability as to prices?
34967 A. Yes, rather than fluctuating prices. Assuming that the price is a fair price, a stable price at a fair level is better than a fluctuating price, which, in order to give the average would have to be alternately above and below the fair price. And the public would not be benefited by fluctuations.

Q. Do you think it desirable that such fluctuations somehow be prevented?

A. We're not—I don't think we've ever been conscious of any deliberate effort to prevent fluctuations, but automatically the prices under ordinary conditions have remained fairly stable.

Q. Well, I am anxious to just get your mental reaction to these various questions, whether you think that such fluctuations are somehow desirable to be prevented?

A. I think it would be desirable to prevent fluctuations.

Q. I take it—

A. Or rather,—I would rather put it this way, if I may, Mr. Wooden. It—I think it would be desirable if violent fluctuations did not occur. I don't think it any part of my job to prevent them.

Q. Well, didn't you think it was part of your job in handling Universal-Atlas sales to prevent them so far as you could?

A. I was never conscious of any real desire to prevent fluctuations. I was desirous of—of stabilizing the
34968 price and earn a fair return. If that meant avoidance of fluctuations, that was fine, too.

Q. Well, I take it that what you chiefly meant by your expression, "a rigid f.o.b. mill price," you meant one that was the same to all buyers at a given time?

A. Yes, and for a fairly long length of time until there was a real reason for a change up or down.

Q. You would not consider a change in competitive conditions as a real reason?

A. Yes, if—if we had a rigid price base at our mills—if we had at Universal and if we had mills in neighboring territories competed with us, lowered their price base, I'd feel that I ought to give consideration to lowering ours rather than letting competitors get in under our back door—get into our backyard, rather, as Mr. Frittell calls it.

Q. At the same time, you think that would promote an unstable condition?

A. Yes.

Q. Now, I believe you said that if your had this rigid f.o.b. mill price, the same to all customers, that within the area where you had a freight advantage, that you would have a local monopoly?

A. Yes.

Q. To the extent that you had it, it would be only
34969 because your price was lower than anybody else was making in that territory—in that area, wouldn't it?

A. Correct.

Q. In other words, you would have a monopoly gained by selling at a lower price than somebody else?

A. Correct. Correct. No competition.

Q. And at any time you raised your price to take advantage of your local monopoly, outsiders might come in that territory?

A. Through the margin around and—

Q. Yes. And of course, some of your mills, are they not located right in the same area and locality as some of your competitors?

A. Yes.

Q. So there you would have to—

A. You'd have—

Q. —Share your business—

A. Oh, yes.

Q. —With them. You seem to have the conception—correct me if I'm wrong, that if you had a variable mill price that it must necessarily be variable to the same extent that your mill nets are now variable; is that correct?

A. I think that's about right.

Q. In other words, that your delivered prices must necessarily reflect that variation in mill prices and
34970 result in the same delivered prices that your competitors make?

A. I think that's a correct statement.

Q. You would not consider it feasible for the variable mill prices to be made not in consideration of where the cement was to be taken or used but in consideration of the quantity involved, for instance, without regard to where it was going to be used?

A. If I understand your question correctly, I think I'd answer by saying that it's always been my feeling, at least for a great many years, that the small buyer ought, in justice, be able to buy his cement as at low a base of price as the large buyer. And we have followed that plan.

The carload unit has been the minimum unit. Now, we've had a lot of arguments from dealers who bought a lot of cement, because they buy twenty cars a year, paid the same price or they paid on the same basis of price as the dealer who bought one car a year.

I've always defended that on the reason that—not that I pretend to be any more righteous than anybody else, but it seemed—just seemed fair that the small dealers, cement—just seemed fair that the small dealer selling cement to farmers in this neighborhood ought to buy it as cheap or on as cheap a basis as the large dealer.

34971 Q. You wouldn't think that a difference in selling cost to different purchases ought to make any difference in the price made to them?

A. No, that—I didn't think that. I believe it's permitted by law now to make a difference equal to the saving in cost, but I don't think that's sound. We—that's a procedure that I followed all the time, and I hope it'll continue.

Q. You have not thought it desirable, feasible, to make a difference in price on a million barrels because of the lower selling cost involved per barrel?

A. No, nor if I may continue, did I ever feel that the Government or any political sub-division thereof, ought to buy on a cheaper basis of price than a little two-by-four dealer or contractor, because we're all taxpayers, the Government is all of us, and while it is sometimes argued, frequently argued that the cost of selling a big order is small, there have been many cases where the cost of selling a big order has been pretty high.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wooden:

Q. In discussing the final outcome of using an optional method of pricing whereby the buyer can buy either

34972 way—that, is, f.o.b. mill or delivered—I believe you gave the illustration of your Waco mill, did you not?

A. Yes. I used Waco because Waco is an instance of an isolated plant in the center of a territory, doing business in a large city market at some distance away. There are others similar, but not quite so—so marked illustrations, as that.

Q. That was intended as an illustration as to what might occur in—

A. I intended it so.

Q. Would occur in many sections of the country?

A. Yes, sir, I intended it as typical.

Q. Well, now, as I understood it, you said on the op-

tional basis the Dallas dealers would come down to Waco and buy at the mill?

A. Well, they would have—

Q. And then take it up to Dallas; is that right?

A. No, if they bought from us, they'd have us ship it up there by rail, and they'd have to take it in carload lots; whereas, they could get it from the Dallas mills in smaller lots by going to the mill and getting it.

Q. Why couldn't they come to your Waco mill and take it away in trucks?

A. Well, it's too far to truck.

Q. Well, I didn't understand—

34973 A. It's a hundred miles away, or so, I think. It would be a rail movement from Waco to Dallas. And if we wanted to be on an equal footing in Dallas with the two mills that are in Dallas, it looks to me as though we'd have to build a distribution station or warehouse or make some similar arrangement, which would be very expensive both in—

Q. You do not think it would be—

A. —Both in the capital investment and expense.

Q. You do not think it would be feasible for Dallas dealers to come to Waco and buy at the mill there and take it to Dallas?

A. Oh, I don't think they'd drive a hundred and—do you know the distance?

Mr. Hershberger: I think your figure is about right.

The Witness: Hundred miles or so.

Mr. Hershberger: That's about right.

By Mr. Wooden:

Q. In other words, they'd prefer to buy it from the Dallas mills?

A. Oh, yes, two of them right there.

Q. But wouldn't this optional method greatly tend to increase your problem of diversion?

A. Oh, yes, yes.

34974 Q. In other words, there would be cases—

A. Yes.

Q. In many cases where the dealers in one town would go to the mill and then if their competitive relationship with other dealers—

A. Yes.

Q. —Have an advantage?

A. Yes.

Q. When you had the mill at Universal on a non-basing point basis, how much freight advantage did that give you in that local market over the Lehigh Valley?

A. That's so long ago, Mr. Wooden, that I can't possibly remember. That was before the war when freight rates on cement I think were less than half what they are now, and an entirely different situation.

Q. What did your Buffington mill base on before it became a base, LaSalle?

A. Based on LaSalle. My predecessor, before we enlarged the mill thought that we could make more money by basing it on a mill a hundred and twenty miles away than by basing it on the Buffington mill. But when we enlarged it as we did the mill at Pittsburgh about the same time, the tonnage produced at Buffington, was too large, and it was just a fiction to base it on some outside mill.

Q. You had a great advantage over LaSalle in
34975 Chicago, didn't you?

A. Oh, yes.

Q. How much?

A. Well, there again, it was before the war. We—freight rates on cement were less than half of what they are now. I don't remember what the difference was, but considerable. Into Chicago, a distance of twenty miles to the center of town, as against LaSalle a hundred and twenty, or about that.

Q. Well, what did that amount to?

A. I don't—

Q. Approximately?

A. I don't—

Q. On a barrel?

A. I don't remember.

Q. Not even approximately? I am not asking you to be exact. Give a minimum figure that would be safe.

A. Oh, it would be around fifteen cents a barrel, I should say, difference.

Q. Was Chicago your principal consuming market?

A. Yes, our largest single market.

Q. When you said on direct that you got a higher price at your Universal mill by basing on the Lehigh Valley, you meant that you got a higher mill net in the Pittsburgh district?

34976 A. Yes, yes, yes.

34977 Washington, D. C.,
March 19, 1940.

34978 B. F. AFFLECK, thereupon resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Wooden.

Q. Mr. Affleck, you testified on direct, at page 34763, regarding the competition between the Buffington plant of the Universal and the Hannibal plant of the Atlas Company: I believe you said they were some 280 miles apart, and that there was some competition between them in the intervening territory; is that correct?

A. Yes.

Q. Did the Atlas plant come eastward as far as Buffington in its sales?

A. To some extent.

34979 Q. And even beyond toward the east?

A. Yes, at times.

Q. Did the Buffington plant sell as far west as Hannibal?

A. And west of Hannibal.

Q. And west of Hannibal.

Is that the only instance where the Atlas plants were in competition with the Universal plants?

A. No.

Q. What others?

A. There was some shipment from the Universal plants into territory where the Atlas freight was lower, and from the Atlas plant into territory where Universal freight was lower, but that applies in a sort of an irregular way to all the plants of Universal and Atlas to a rather limited extent, quite limited.

Q. Which ones showed the more pronounced condition that you just referred to?

A. I wouldn't know, Mr. Wooden.

Q. Now, you spoke of a condition of chaos during the summer of 1935, after the N.R.A. Code went out. What was the nature of that chaos that you referred to?

A. During the Code period, we had a certain condition of affairs brought about by the N.I.R.A., which Act was subsequently declared unconstitutional. The conditions existing during that period were different in several im-

portant respects from the conditions previous to the N.I.R.A.

34980 Q. But what was the nature of the chaos that you refer to?

A. Well, the cement industry did not know whether the conditions existing previous to the Code days would return or whether there would be something different. I think I testified the other day that word came out of Washington—I do not know just from what individual or what department, but I think it was made quite clear that Washington desired that, so far as possible, the conditions during the N.I.R.A. days be continued, especially with respect to certain conditions with the N.I.R.A.

Q. You refer there to conditions affecting labor, wages, and hours?

A. Wages, labor, and hours; yes.

Q. I still am not quite clear, and I do not think you have answered my question, as to what was the nature of that chaos following the N.R.A. invalidation.

A. One of the things during the Code days was the filing of prices as part of the Code. The cement industry did not know whether price filing would continue or not. As a matter of fact, if I remember correctly, it did continue for a while, and then, first one and then another of the companies quit filing prices.

Q. In other words, it was continued during the Trade Practices Committee—the filing of prices.

A. It was continued, I think, for a time—a few
34981 weeks, perhaps—and then gradually that price filing structure disintegrated, and I think in six or eight months it was discontinued entirely.

Q. You do not mean to say that following the invalidation of the N.R.A. Code that prices went to pieces.

A. No.

Q. You do not mean to say that there was a chaotic condition of prices.

A. No, no, not in that respect.

Q. And in that respect it was considerably different from the conditions that existed—

A. Yes.

Q. (Continuing.) —prior to the N.R.A. Code?

A. Yes. I do not mean that the chaos and confusion related to price demoralization, such as existed in 1931 and 1932.

Q. You describe the preparation and circulation of this Compendium as something connected with this chaotic condition. Is that the way that it appealed to you, as something put forward to meet this chaotic condition that you refer to?

A. We had this period of uncertainty, and I think the plan, through The Cement Institute, was to restate the trade practices, which was done by what was called, I think, a trade practices report of The Cement Institute, and then that was discarded and the Compendium was brought out at the Denver meeting first.

34982 Q. Well, the Compendium quite largely restated or reaffirmed many of the provisions that were contained in the N.R.A. Code?

A. Yes.

Q. And were there not some provisions in the Compendium that had not been in common practice prior to the N.R.A. Code?

A. As I remember that document, which I did not study very carefully, I do not think it contained anything new. I think it was a restatement of practices and procedure that had been in effect for a long time.

Trial Examiner Norwood: You mean in effect with respect to all the companies?

The Witness: Practically all, Your Honor, exceptions here and there as between companies. Some companies were—especially the smaller companies—were rather careless, and some exceptions, of course, as to certain provisions.

By Mr. Wooden:

Q. Well, for instance, the five day notice of advance was something that there wasn't any consistency to or generality to prior to the N.R.A. Code; is that right?

A. That five-day provision is something that I don't remember. I don't remember when that came into use, whether that was during or before Code days.

Q. Referring to your testimony about the legal advice that you got in 1932, and which you circulated—I don't have the exhibits here. I have sent for them.

34983 How did that legal advice happen to be given at that time? Had you asked for it?

A. No.

Q. Do you know how it happened to be given you at that time?

A. No.

Q. Is that the first time you had gotten such advice from the Steel Corporation attorneys?

A. The first time we had any memorandum as complete as that, and perhaps the first time we had any written advice on those subjects in prior years, especially going back to the time of the several suits filed against different groups of companies in different parts of country, in conferences with the general counsel of U. S. Steel prior to Governor Miller's time, I had personally been given very—pretty definite instructions as to what we could do and what we could not do.

Q. That advice that you received in June, 1932, permitted you to discuss matters with—competitive conditions and practices with competitors but drew the line, as I understand it, at entering into any agreement or understanding regarding future courses of action; is that right?

A. I think that is about right, Mr. Wooden.

Q. And, as I recall it, the advice was that you might discuss with competitors matters relating to stabilization of business?

A. I don't remember that that was in Governor Miller's—

Q. I have it here, something of that sort. And 34984 you were permitted also to discuss under the terms of your legal advice matters relating to business ethics?

A. I think that was expressed or implied. I don't remember at this date except as my memory was refreshed today, just briefly.

Q. Did you proceed to have some discussion with competitors within the terms of the legal advice that you were given?

A. As I remember that legal advice, it said that we might do certain things which, as a matter of fact, we had not done to any appreciable extent, not to any large extent, certainly, before, and we did not do afterwards.

Q. You mean to say that you didn't even go as far as the legal opinion would have permitted you to go?

A. No, no. The occasion didn't arise for discussing some of the things which this legal opinion said we might discuss. I think I mentioned the other day capacities, for instance. That wasn't much gone into because that is pretty generally known.

Q. What things did you consider came within the general terminology of business ethics?

A. What things that came within—

Q. Yes.

A. Quite a list of things, more or less important, as enumerated in the Code which we—not the Code, but the Code or Compendium. I forget which it was.

34985 Q. Well, this was before either the Code or the Compendium.

A. Well, those same subjects.

Q. That same general type?

A. Yes.

Q. In other words, business ethics would include competitive practices?

A. No, that wouldn't be a part of—you say competitive practices?

Q. Yes.

A. If you leave the word "practices" off, I would say it did not include it, but practices of competitors might be comprehended in the word "ethics."

Q. At any rate, the Code and Compendium included things of that type.

A. Yes.

Q. Were not the conditions at that time unusually conducive towards a discussion of competitive practices and stabilization of business?

A. After the abandonment of the Code?

Q. No; at that time—prior to the summer of 1932.

A. In 1932?

Q. Yes.

A. That was typical of the depression, as we all know.

Q. Well, you did have some discussion with competitors about that time, did you not, about the matter of

34986 stabilizing the business?

A. I do not think it would come under the heading of stabilizing business, but I did have conversations with competitors quite frequently. I would see them on the street or in hotels or clubs or on the train.

Q. You had contacts with them about that time with regard to the unusually bad condition of business?

A. Oh, yes.

Q. Did you discuss with them what the causes of it were?

A. Yes, we shed a lot of tears over the conditions as they existed, and hoped for better times.

Q. Did you discuss with them some of the efforts of some companies to increase their volume of sales in the face of a reduced demand?

A. Oh, I think we touched on that. It would be natural.

Q. And did you discuss the matter of the way prices were demoralized?

A. Yes.

Q. What competitors can you name with whom you had such discussion?

A. During the period of—

Q. Yes, during that period.

A. What period, Mr. Wooden?

Q. The summer of 1932.

A. In the summer of 1932 I do not remember
34987 whether there were any meetings of committees or otherwise, but—

Q. Did you have some discussions of that sort with competitors whose representatives met with you at directors' meetings of the Portland Cement Association?

A. I think the directors of the Portland Cement Association met only twice a year.

Q. At what time?

A. I think the practice was to have an annual meeting in November and a spring meeting in May.

Q. Did you have any special meetings?

A. I do not think the board met in between, but in Chicago I had visits from time to time from some representatives of cement companies from various parts of the country, passing through, and I would frequently see the competitors at the hotel and elsewhere.

Q. Now, I have here Respondents' Exhibit 2463-A to C, inclusive, being the opinion of General Counsel Miller, of the United States Steel Corporation, dated June 7, 1932, and in it he states that each individual competitor has a right to do what he can free from any moral or legal restraints to prevent demoralization and to stabilize the industry. To that end the fullest discussion and the fullest exchange of information are permissible. That was the thing that I referred to a while ago, before I had the exhibit. I understand now that you had such discussions.

34988 A. Yes, I had such discussions. I cannot quite say that our discussions were as full or as comprehensive as indicated by that sentence that you just read.

but, generally, we discussed everything, especially the deplorable conditions existing. There was no secret about the fact that everybody was losing money.

Q. Mr. Miller says: "The harmful effects of cut-throat competition, of unfair methods, of selling below cost, or even a fair margin of profit, and the like, are legitimate subjects of discussion."

A. Yes.

Q. Did you discuss those things?

A. Yes.

Q. What did you conclude was the cause of the troubles that you were discussing?

A. I do not think we reached a conclusion as to the cause.

Q. Not even any cause at all? Perhaps, "cause" is a very complex subject; there may be a dozen causes, but you did not find out in your own mind what any cause was?

A. Basically, I think we knew before, and we did not need to find out, that the cause of it was just the meanness of human nature.

Q. The meanness of human nature among competitors?

A. Yes.

Q. How exemplified?

A. As exemplified by cut-throat competition and prices made without any regard for cost or financial return.

Q. That was a period, I believe you testified the other day, during which there was a great deal of variation and prices between different competitors and successive lowering of prices.

A. There was a variation, but gradually the variation would iron out on a uniform level.

Q. But a lower level.

A. On a lower level. From time to time certain companies would be lower, but as the prices were met these different competitors seemed to get down to a uniform basis—a uniform level.

Q. I notice, referring to Respondents' Exhibit 2466-A that copies of that document were sent to Mr. M. A. Berns. Who was Mr. Berns?

A. Publicity manager of the company.

Q. What was the reason for sending him legal opinions about such matters as we have been discussing?

A. For his information.

Q. Who is H. G. Farmer?

A. Farmer's title is technical service director, engineer—for his information.

Q. What interest would it be to a man in his position—

A. I beg your pardon?

34990 Q. —to have these legal opinions.

A. What is the first part of your question?

Mr. Wooden: Will you read the question?

Trial Examiner Norwood: Read it.

(Question read.)

A. I do not think it would be of any interest to him, but in the routine of our office correspondence things of that sort automatically went to—there is a name there that you did not mention—Greenley. These things automatically went to Greenley, Farmer, and Berns.

By Mr. Wooden:

Q. Greenley was in the sales department?

A. He was in the sales department, assistant to Mr. Stone.

Q. In these discussions that you had with competitors, were there some competitors that were considered as being somewhat or showing more the cussedness of human nature than some others?

A. Yes, yes, there were.

Q. Who were they?

A. I don't think you ought to ask me that.

Q. Well, I think it is really necessary that I do.

Trial Examiner Norwood: You can specify the companies.

The Witness: I beg your pardon?

Trial Examiner Norwood: You can specify the 34991 companies without embarrassment, can't you?

Mr. Hershberger: Of course, I might say as an objection—I don't want to object very frequently to these cross-examination questions, but we didn't go over that on direct. This is not proper cross-examination, and, of course, the field of cross-examination has gone far beyond the direct.

Mr. Wooden: You went into it when you put in these legal opinions.

Trial Examiner Norwood: I think it ties in. We agreed that this witness could tell the whole story.

A. I was president of the company at that time. I wouldn't have the details of the performances of our competitors as familiarly as the general sales manager.

By Mr. Wooden:

Q. And yet you got the information, didn't you, as to who—

A. Do I have to answer that, Your Honor?

Trial Examiner Norwood: Is it very important?

Mr. Wooden: I think it is.

Trial Examiner Norwood: I think you should answer the question.

A. Well, we have in the thirty or forty States where we do business—we have a hundred or so, seventy or eighty competitors, or fifty or sixty, anyway, and your question is which of them are the worst or which one was the worst?

34992 By Mr. Wooden:

Q. Well, which one and ones.

Mr. Hershberger: You are confining that to a particular period of time, are you, Mr. Wooden?

Mr. Wooden: Yes.

Mr. Hershberger: What time?

Mr. Wooden: The period of 1932.

A. The Marquette Company, the Huron Company, in the Middle West.

How far do I have to go, Mr. Wooden?

By Mr. Wooden:

Q. Well, have you got any others to put in that class? Don't stop.

A. Eight years is a fairly long time ago, and my memory doesn't serve very well, but in the East, the Whitehall, the National.

Q. What National do you refer to?

A. National—

Q. In Pennsylvania or in Alabama?

A. In Pennsylvania.

Q. It is the National Portland Cement Company.

A. Yes, National—I think that is National Portland Cement Company. And in the Southeast perhaps the Volunteer would be entitled to a place on the roll of honor; Southwest; the San Antonio and Long Horn.

34993 I think that is as far as I am going unless I have to go further. I have gone too far already.

Q. Did you have some contacts or discussions with representatives of those companies that you named?

A. The Marquette Company's general office is in Chi-

cago. I saw their people from time to time on the street or elsewhere, in a club.

Q. Did you discuss with them the conditions that you have been referring to?

A. Yes, I expressed my regret that prices were on a non-profitable basis.

Q. What did you learn from them in the same connection?

A. I learned from them that they thought prices were too low, also.

Q. Is that all your learned from them?

A. That is about all. Nothing resulted.

Q. Neither of you learned anything that you didn't know before?

A. That is right.

Q. I take it, that you answer to Mr. Hershberger, on page 34909, to the effect that you had never agreed with any competitors to follow the practices such as were included in the Compendium that applies to the period of your whole experience in the industry?

A. Your question refers to the Compendium of 1935?

34804 Q. Well, it grew out of your testimony about the Compendium, I think.

A. Oh, yes.

Q. But he asked you on page 34909 whether you had agreed with your competitors at any time, and your answer was "No," and it was really going over the same ground. In other words, your testimony applies to the whole period of your experience.

A. Yes, that is right.

Q. Does it apply to the period and to the conditions that obtained during your connection with the Portland Cement Association as a member or as an officer?

A. Yes.

Q. You were an officer of the Portland Cement Association at one time, were you not?

A. Yes.

Q. Were you president?

A. Yes.

Q. When was that?

A. '16 to '21.

Q. When you were first president, was it then known as the Association of American Portland Cement Manufacturers?

A. It had been known as that and the office was in Philadelphia. Simultaneous with my election as president, the Association was reorganized; its scope greatly expanded, and the name changed to Portland Cement
34995 Association. That I think was in 1916, or about that time.

Q. You had been active in the predecessor association for some years, too, hadn't you?

A. Our company had been a member prior to that time, and I had attended most of the meetings. I was sales manager, then.

Q. Had you served on committees in the predecessor organization?

A. I think so.

Q. What committees, do you recall?

A. Oh, that goes back so far, I don't remember the names of the committees, or what committees I served on.

Q. Did you serve on a committee on trade relations?

A. If there was such a committee, I may have served on it.

Mr. Wooden: Your Honor, in view of the witness' testimony, also in view of the testimony of witnesses who have preceded him, and called by Respondents, and in impeachment of his and their testimony, I desire to offer at this time Commission's Exhibit 3235-A to 3235-Z-114, and 3236-A to 3236-Z-107, the same being copies of minutes and extracts from minutes of the Portland Cement Association, and the Association of American Portland Cement Manufacturers; these exhibits having been identified by the Witness J. W. Kemp in New York, I think in December, December 6, 1939.

Trial Examiner Norwood: Have you the record 34996 page there?

Mr. Wooden: Pardon me?

Page 23114. That is the beginning of it:

Trial Examiner Norwood: Yes. All right.

Mr. Wooden: Mr. Kemp, it will be recalled, was at one time in the employ of the Department of Justice, and in the course of his official duties obtained these minutes from the proper custodians of the Association officials, and made these copies and checked them against the originals.

I wish, in offering these exhibits, to arrange for the substitution of photostatic copies, which are available, and

which have been made and contain the identification numbers of the originals, but what I am offering is a photostatic copy of the originals.

I also offer, as further evidence of the authenticity and the reliability of these exhibits, Commission's Exhibits 3237-A to H, inclusive, consisting of registered receipts, correspondence, and return registered receipts, showing the reception of these original documents by Mr. Kemp, and his return to the officials of the Portland Cement Association.

Mr. Hershberger: I would like to make a statement on that, Your Honor.

Trial Examiner Norwood: Does this relate to 34997 the activities about which this witness has testified?

Mr. Wooden: They are offered in impeachment of the witness' testimony that at no time in his experience, in connection with the Universal-Atlas Company, or the Universal Company, or the predecessor department of the Illinois Steel Company, did he ever enter into any agreements or understandings with competitors about the subjects that he testified to on direct examination.

Trial Examiner Norwood: Well, are they of such a character that you should question him and give him a chance to explain?

Mr. Wooden: I would not think that that is necessary, Your Honor, because he has made an unqualified denial of the things to which I believe these documents go.

Trial Examiner Norwood: Well, I thought possibly they contain speeches or something like that.

Mr. Wooden: They contain many statements by him and by competitors to him. They are offered as admissions, a record of admissions of that character, and, as I say, an impeachment of his testimony, without going into the details covering each particular case. Of course, it goes without saying that if opposing counsel wish to get him to explain any of these things, that is their privilege,

and I would say that while these documents might 34998 logically be withheld until rebuttal, they are offered at this time partly in order to give the other side an opportunity to, you might say, explain or rebut them before we reached the rebuttal stage, and after which they would not have, presumably, the opportunity; so it is with the greatest degree of fairness to them that we offer them at this time.

Mr. Hershberger: I appreciate that statement of Mr. Wooden, but I would like to have an opportunity to examine them.

However, I would like to state as an objection to this method of attempting impeachment that it is not the duty of Respondent's Counsel, whose witness he is attempting to impeach, to justify his testimony. The burden is on the Commission, in trying to impeach the testimony, to prove it. In other words, they have no right to hand in a bundle of documents and say, "This impeaches your witness. Now, you justify it."

I take the position that if he wishes to impeach this witness, he must show him the document and say to Mr. Affleck, in substance, "Did you write this document?" or "Did you say what it says therein, and does it show that your oral testimony now given is untrue?" That is the way to impeach a witness.

Trial Examiner Norwood: I gather that this is,
34999 strictly speaking, matter which contradicts rather than impeaches.

Mr. Hershberger: Perhaps that is true.

Trial Examiner Norwood: That there is evidence contrary to the testimony that he has given?

Mr. Hershberger: I do not know what it is, and, of course, I was merely using the language that Mr. Wooden used. He used the word "impeach."

Trial Examiner Norwood: If the last statement is correct, it is probably fairer to receive them now, if they are receivable at all, than to wait until another time.

Mr. Herschberger: I would object to having the burden thrown upon me of taking a great mass of documents, as there obviously is from the exhibit numbers, and attempting to justify them. In other words, I do not think the burden should be put upon me to take that testimony under the assumption that unless I disprove it, it contradicts Mr. Affleck's testimony at this hearing. I think that is on the Commission.

Trial Examiner Norwood: Anything that Counsel assumes is not binding at all. The documents are either evidence or they are not evidence.

Mr. Hershberger: That is right.

Trial Examiner Norwood: And they either con-
35000 tradict or do not contradict. It does not depend upon statements about that.

Mr. Hershberger: Presumably, they have been held from going into evidence in the past, for some reason or other, that seemed sufficient in Your Honor's mind to withhold them at that time. It would not seem—

Mr. Wooden: They were not offered.

Mr. Hershberger: It would not seem to me, however, that if he were trying to contradict the witness' testimony that would make them any more relevant or material; and I would make the further objection, that these exhibits, if they refer to ancient periods, as I understand it, many years before the formation of The Cement Institute, they are too remote to be proper evidence in this case. They all go way back of even the time of the old Cement Manufacturers Association case, and they are all so remote that anything in them would have no relevant or material bearing to prove what has been done within the period of time that we have been considering in this case. I do not think that because you say something might have been done in 1910 or 1911 or 1912, that necessarily the same thing was done in 1925 or 1926 or 1927.

Trial Examiner Norwood: Well, we have gone into many things that antedate 1912.

35001 Mr. Wooden: The answer to that is this, Your Honor: On direct examination of this witness, an attempt was made to show that many of the existing trade practices in the industry were matters of ancient evolution, so to speak. This is to combat the inference that they were just matters of ordinary evolution. They go to the question of whether they did not grow out of some concert of action by Respondents.

Mr. Hershberger: Let me say one thing further and then I will stop: If it is a matter of impeaching this witness' testimony, I think you should proceed in the regular way that impeachment should be made, that we should not be handed a large bundle of documents and be required to shoulder the burden of trying to justify what our witness has said. In other words, I would like to have Counsel for the Commission, if he desires to impeach, proceed by asking the witness questions as to whether he did so and so, which Mr. Wooden claims these exhibits now show to be incorrect. That is the proper way to impeach, as I understand it.

Mr. Wooden: I did already ask him general questions.

Mr. Hershberger: You have not shown him any of these documents.

Mr. Wooden: I asked him about some of the statements, many of the statements, contained in these
35002 documents.

Mr. Hershberger: You have not shown him any of these documents, and neither the witness nor I have the slightest idea of what the statements in them are.

Mr. Brick: On behalf of Respondents other than Universal-Atlas Company, Your Honor, I would like to make a request at this time to examine the papers offered by Mr. Wooden, and also the exhibits to which he made reference. We have copies of those papers, but they are in New York.

As to the specific ground which Mr. Wooden has stated in support of his offer, that being the ground of impeachment, I now make the objection that no foundation has been laid for an offer of that character, that on the basis of the ground stated by Mr. Wooden the offer in its entirety is incompetent, irrelevant, and immaterial.

As to any further objections which we desire to have apply to that offer, I would like to have the time as requested. I do not know whether Mr. Wooden is confining his offer to the ground of impeachment, or whether he has in mind other general grounds, and I would like to make the request now that he inform us as to that.

Trial Examiner Norwood: I think he made a
35003 very full statement.

Mr. Brick: He made it full on the ground of impeachment, but as far as any other grounds are concerned, I think you will have to rely upon the statement made by Your Honor. Now, I do not know whether he has adopted your statement or not.

Mr. Wooden: I do not know just what statement you are referring to there.

Mr. Brick: His Honor suggested that you had not laid a foundation for offering impeaching material.

Trial Examiner Norwood: One of my questions suggested that.

Mr. Brick: And suggested that you were offering it on other grounds. I would like to have the record clear, if we could, as to whether you are adopting His Honor's statement, and whether you are offering it on the grounds other than impeachment.

Trial Examiner Norwood: No, I made no statement. I asked him questions, which may have carried some suggestions to Counsel's mind.

Mr. Wooden: I understand it now, and I will say this: They are offered on the ground of impeachment, as being a sufficient ground for offering them at this time; but, in addition to that, I think they are admissible at this
35004 time on other grounds—on the ground of their containing admissions, but, after all, that impinges on the ground of impeachment, and also because I wish to give Counsel for the Respondent the opportunity of meeting this before they close their case, instead of being in the position of attempting to meet it after we offer it on rebuttal.

Mr. Brick: You have to lay some foundation, I should think, for material of this character, regardless of when you offer it.

Trial Examiner Norwood: I think the proper disposition of this matter is this: The Counsel for the Respondents should have time to examine the papers and make their objections, and in the meantime if Counsel for the Commission wishes to examine this witness on any special parts of those documents, they may proceed to do so. If they do not wish to do that, we will go ahead and permit Counsel for the Respondents to examine the papers, and rule on them later.

Mr. Hershberger: I think that is very satisfactory. In other words, there won't be any occasion for passing on it immediately?

Trial Examiner Norwood: No, not just this morning, but I think—

Mr. Hershberger: Let me ask this question, Your Honor: Do you recall whether those papers—per-
35005 haps Mr. Wooden can answer that.

Mr. Wooden: What?

Mr. Hershberger: Those papers that you are offering, they were identified by a witness that you mentioned, but were there objections? Did you make an offer at that time?

Mr. Wooden: I didn't make an offer.

Mr. Hershberger: You haven't made an offer?

Mr. Wooden: This is the first offer made.

Trial Examiner Norwood: I should like to examine the record on that, too. I have some recollection of the papers, but I would like to examine them.

May copies of those be delivered to the Respondents?

Mr. Wooden: What we have offered may be taken for the purpose of examination.

Trial Examiner Norwood: All right.

Mr. Wooden: Being the photographic copies.

M. Hershberger: I should just like to say—are those the papers that you now have in your hand?

Mr. Wooden: Yes.

Mr. Hershberger: There appears to be a volume of papers here that would—

Mr. Wooden: Well, you have the number of pages.

Mr. Hershberger: Two or two and a half inches in height piled one on top of the other, perhaps some
35006 two hundred or more different documents, and it is obviously going to take a considerable length of time to go over those.

Mr. Wooden: There are 414 in one and 107 in the other.

Mr. Hershberger: All right. If this witness is excused prior to the time that we have an opportunity to examine these papers, of course, I would not want this witness to be precluded from an opportunity to make such denials as we might desire at a later time to make, and I suppose, of course, that you contemplate that opportunity will be given me? Is that correct?

Mr. Wooden: That was contemplated in my offer.

Mr. Hershberger: Yes.

Mr. Wooden: But—

Mr. Hershberger: I don't mean—

Mr. Wooden: I think there ought to be some limitation upon when you will exercise that privilege. I think you ought to do it promptly and not leave it go indefinitely and maybe for months or weeks.

Mr. Hershberger: It will certainly be weeks because I have too much ahead of me now to even start reading these papers for some considerable time, and I don't mean by what I said a moment ago to indicate that we accept
35007 the burden of trying to justify the present examination of Mr. Affleck.

Trial Examiner Norwood: I think that possibly counsel could examine those papers over night.

Mr. Hershberger: After we look at them maybe we will have something further to say.

Trial Examiner Norwood: And be able to state his objections here tomorrow morning.

Mr. Brick: Well, Your Honor—

Mr. Wooden: I understand there are several other witnesses from the same company coming on.

Trial Examiner Norwood: Yes.

Mr. Wooden: And all I would ask is that the limit of such examination of the documents be not later than the close of the testimony by other witnesses from the same company.

Trial Examiner Norwood: I think that we should not delay this for weeks.

35011 Trial Examiner Norwood: I have to look at them, though, before I rule on them. I am going to see them.

Mr. Paulson: It is a very simple proposition that is before us, because the witness that identified them identified them as being minutes of the Portland Cement Association, or its predecessor, as of a period designated on the exhibits. Now, the question before us is simply: Are minutes of the Portland Cement Association, or its predecessor, which were attended by these men, Mr. Affleck being one of them, admissible here under the circumstances? It is not so complicated as it seems on the surface.

35012 Trial Examiner Norwood: If counsel should be given time to examine them and state their objections to them, what I wanted to make plain is I am not willing for any indefinite delay.

Mr. Hershberger: We don't want that, Your Honor. We will have no trouble at all in getting along with you on that, I am sure.

Trial Examiner Norwood: The discussion is closed, and counsel for the Commission may examine this witness on other documents, the pending proffer, if he wishes, and in any view of the case the Counsel for the Respondents shall have the time stated to study the papers and make their objections.

Mr. Wooden: I will ask just one or two questions, Your Honor, based on the papers.

Trial Examiner Norwood: Yes.

By Mr. Wooden:

Q. Mr. Affleck, shewing you Commission's Exhibit, for identification, No. 3235-Z-14, the fifth annual meeting of the Association of American Portland Cement Manufacturers, in December, 1907, purporting to be—

Mr. Hershberger: What year?

Mr. Wooden: 1907.

Mr. Hershberger: 1907?

Mr. Wooden: Yes.

By Mr. Wooden:

35013 Q. Do you recall an appointment of a committee of the Association to hold a conference with the president of the Universal Atlas Company?

Mr. Hershberger: Your Honor, I would like to state an objection to that question on the ground that the question indicates that the period of time to which the matter relates preceded the anti-trust laws under which this proceeding is brought. There was no Federal Trade Commission Act at that time; there was no Clayton Act at that time. The only charges in this complaint are based upon the Federal Trade Commission and the Clayton Act, as amended, and whatever it might show in the way of agreement would be perfectly legal, as far as that is concerned, and there should be no burdening of the record by material of that date.

Trial Examiner Norwood: As I understand, this is only on the issue of whether or not present methods are an evolution, and present methods—

Mr Hershberger: No.

Trial Examiner Norwood: —were employed from the time to which the memory of man runs not to the contrary.

Mr. Hershberger: I understood Mr. Wooden's question to be different. I understood Mr. Wooden's question to be predicated upon the statement he made a while ago, that he proposed by this exhibit that he is now mention-

35014 ing, and the other exhibits, to impeach Mr. Affleck's testimony, that Mr. Affleck had not entered into agreement with competitors in violation of law, and, therefore, my objection is that cannot be proper at this time because there couldn't have been any violation of the law at that time. The Act under which we are proceeding was not in force and effect then.

Trial Examiner Norwood: I shall overrule the objection and let the witness tell us about these matters.

Mr. Wooden: It is well settled in the Standard Oil case that the origin of the alleged combination might be traced prior to 1890.

Mr. Hershberger: Are you endeavoring to inerely draw the origin? If that is so, I am in error as to what I have said. Is that all you are confining this question to?

Mr. Wooden: No, I am not confining it to that only.

Trial Examiner Norwood: The objection is overruled.

Mr. Wooden: Read the question.

(Last question read by Reporter.)

By Mr. Wooden:

Q. With regard to the ratio of price at which cotton sacks are sold and the price at which they should be repurchased.

A. The question is, do I remember?

Q. Yes.

35015 A. Do I remember what?

Q. A committee to confer with the president of the Universal Portland Cement Company on that subject.

A. I do not.

Q. Do you recall it after looking at the last paragraph on Commission's Exhibit 3235-Z-14, for identification?

A. I do not.

Q. Do you recall any participation by yourself in a conference with competitors at which the arrangement was made that bags should be charged for at 10 cents when they went out, and taken back with a reimbursement of 10 cents?

A. No.

Q. Showing you Exhibit 3235-Z-25, for identification, and the last two paragraphs at the bottom of the page, does that serve to refresh your recollection on it?

Mr. Hershberger: I want to state the same objection to this question that I did to the preceding question, that the exhibit indicates that it is minutes of a meeting held prior to the enactment of any laws under which this action is brought, and that irrespective of what could be done—

Trial Examiner Norwood: Counsel will please stand hereafter when he makes his statement. The Reporter might not get it.

Mr. Hershberger: Yes.

35016 Trial Examiner Norwood: I shall overrule the objection. Counsel has his exception to the entire line.

A. I don't remember that.

Q. Did you know a Mr. Kendall?

A. I don't remember him at all.

Q. Did you know a Mr. Bale, B-a-l-e?

A. B-a-l-e? If you would spell that B-a-y-l-e, I would say "Yes."

Q. Who was B-a-y-l-e?

A. He was president of the Glens Falls Cement Company.

Q. Did you know a Mr. Allison?
A. B. E. Allison? Or just Mr. Allison?
Q. Mr. Allison.
A. Yes.
Q. Who is he?
A. Allison was—what is the year of that? 19—
Q. This is 1907.
A. '07.
Q. Oh, this is 1908, I guess, we are coming to.
A. Allison back in those days, I think, was sales manager of one of the Kansas companies, the Sunflower Company, I think.
Q. Did you know a Mr. Beery, B-e-e-r-y?
A. Yes.
Q. Who was he?
35017 A. Beery was sales manager, I think, of the Sandusky Portland Cement Company.
Q. You knew Albert Moyer, I guess?
A. Albert Moyer?
Q. Albert Moyer.
A. Yes.
Q. Was he president of the American Association of Portland Cement Manufacturers?
A. No, no.
Q. Do you know a Mr. Jones?
Trial Examiner Norwood: When you come to a logical point there—.
Mr. Wooden: Yes, I am almost through.
Q. Do you know a Mr. Jones?
A. You will have to designate a more—
Q. Well, do you know any Mr. Jones' whom you knew as a representative or as prominent in the cement industry?
A. I don't remember any Jones except—Canada?
Q. There was a Jones from Canada, was there?
A. Yes, Frank Jones.
35018 By Mr. Wooden:
Q. Do you recall, Mr. Affleck, your being chairman or vice chairman of the committee on trade conditions of the Association of American Portland Cement Manufacturers?
A. I don't remember it at all, Mr. Wooden.
Q. Showing you Commission's Exhibit 3236-Z-45, does

the appearance of your name thereunder the report of the committee on trade conditions refresh your recollection about your being on that committee?

A. I don't know that these are correct or not, but my name being there does not refresh my memory as to what the committee did or anything about it.

Mr. Wooden: That is all the cross we have of the witness, Your Honor.

Mr. Hershberger: Are you through with Mr. Affleck?

Mr. Wooden: Yes.

Trial Examiner Norwood: Examine him.

Redirect Examination by Mr. Hershberger.

35019 Q. Mr. Affleck, on the cross-examination, last Friday, Mr. Wooden, asked you this question, and you gave the answer that I read, on page 34932:

"Q. You don't think a competitor ought to attempt to increase his percentage of the total volume of business by lowering price?

"A. You asked whether I think he ought not attempt to.

"If he is my competitor, I would say he ought not to attempt to increase his percentage; but if it is myself, I think I ought to attempt to increase my percentage."

Will you please explain that answer? Is that answer correctly reported?

A. I thought, of course, I was being facetious or funny, but on paper, in typewriting, it does not look so funny.

Q. On page 34936, at the bottom of that page, and at the top of page 34937, the following question was asked by Mr. Wooden, and answer made by you:

"Q. Do you accept competition as a fair test of the reasonableness of price?"

And you answered:

"A. I don't think I quite understand how competition would be a test of reasonableness of price."

And there was some further talk about that.

I would like to have you state or explain a little
35020 more fully than you did at that time why you do not think competition would be a test of reasonableness of price, or whatever views you might have as to whether it would or would not be?

Trial Examiner Norwood: Make any further explanation you wish.

By Mr. Hershberger:

Q. Make and further explanation that you can.

Trial Examiner Norwood:

Of your answer.

By Mr. Hershberger:

Q. As to competition being the test of reasonableness of price.

A. What was my answer to that?

Q. You said:

35021 "A. I don't think I quite understand how competition would be a test of reasonableness of price."

Now, what I would like to have you do is to illustrate that.

A. Well, I do not understand how competition would be a test of reasonableness of price. The fact of the matter is that, competition being what it is, as has been defined, the free price competition, whether or not there is price competition seems—

Q. Just a moment. That is not what I am asking you.

A. I beg your pardon.

Q. I do not want to ask you that question. What I am trying to develop is some illustration that would back your statement that competition, in your opinion, is not the measure of reasonableness.

A. Oh! Well, competition may drive the price down to a point where it does not yield a fair return, or where it is ruinous, and in that event competition causes a price situation which is not a test, which cannot be a test of reasonableness of price.

Does that answer that question?

Q. Yes; I think that is it. In other words, what you mean to indicate is that if competition forces price to a level where everybody would be losing money—

Trial Examiner Norwood: Wait a minute. I do not think, if I were you, I would tell him what he mean—

35022 to indicate. Let him tell us what he means to indicate.

A. Competition may result in a price level which is unreasonable—ruinous.

Mr. Hershberger: That is what I wanted to bring out. I guess that is sufficient on that particular thought.

By Mr. Hershberger:

Q. On page 34941, in answer to one of Mr. Wooden's questions, you said:

"A. I would like him to stay out of my territory, but I wouldn't like him to keep me out of his territory."

A. Well, there, again, I did not mean that, of course. That was facetious.

Q. On page 34940, in answer to a question by Mr. Wooden regarding the degree of competition when prices were identical, and, on the other hand, when they were different, you made this answer:

"A. There is more competition if difference in price is 10 cents than if it is 2 cents or 1 cent or a half cent."

I would like to have you expand a little on the statement of the difference in degree of competition, if you can.

A. I do not think that answer was the correct answer. The degree of competition is greater as there are more competitors, but the degree of competition has no re-
35023 lation to whether prices are different. Putting it this way, it depends on the direction from which or to which competition moves, if I may use that illustration. If my competitor is higher than I am, and is coming towards me with a price higher than mine, no matter how much higher, that is the minimum of competition, that competition is negligible, it is not effective. On the other hand, if I am coming in his direction with a price lower than his, my competition is very effective, but ultimately, as a matter of practice, he will meet my price and I will meet his price.

Q. Then, when your prices are identical, is there competition?

A. There is certainly competition when price is identical.

Q. And do you mean price competition?

A. That is price competition.

Q. Of course, that identity obviously means that prices are not different.

A. Yes.

35024 Q. On page 34942, Mr. Wooden asked this question:

"Q. Do you see anything wrong, fallacious, about the concept of one competitor being low at one time in a given locality, and on a given piece of business, and the next time some other competitor being low, the next time a third competitor being low?"

And after some series of questions, I think you answered that you saw nothing wrong about it.

Will you state whether or not you think that that hypothesis, as stated by Mr. Wooden, is feasible in the
35025 cement business?

A. I do not think that situation could be brought about, except by collusion—division of business.

Q. Mr. Wooden asked you some questions whether you thought what you had testified was perfect competition, and, again, as to whether what you had testified constituted imperfect competition. Now, there, again, I merely want to ask you whether, in your answers, you had in mind economic definitions of those terms?

A. No; not as set forth in certain text books. I had in mind the situation as it exists in the cement industry.

Q. On page 34957 you were discussing with Mr. Wooden the question of whether, if cross hauling were eliminated, the increase in mill net per barrel would offset the shrinkage in volume.

Mr. Wooden: Would tend to offset.

By Mr. Hershberger:

Q. (Continuing.) Would tend to offset the shrinkage in volume. I would like to have you expand on that a little more, giving consideration to particular mills of your company, if you can do so.

A. What was the question again?

Trial Examiner Norwood: Read it.

(Question read.)

By Mr. Hershberger:

35026 Q. And before you answer that, let me correct my question—to indicate the increase of average mill net per barrel. In other words, whether that would accomplish a balancing so that the increase of average mill net would offset the loss of volume of business.

A. That depends on conditions.

Q. What conditions would be—

A. That question, I do not think, can be answered without trying it out. I do not think we could find out.

Q. What would be the factors that would influence whether there would be that offset.

A. Well, the elimination of cross-hauling would limit the territory in which any of our mills would operate.

Q. Then, you would have to consider the conditions in the particular territory that was thus defined.

A. Yes.

Q. What would be the particular conditions in the territory that you would have to consider?

A. The consumption of cement, which would fluctuate violently.

Q. So that in a territory where there was a large consumption, you might not have the same answer.

A. Yes.

Q. As in a territory where there was a small consumption.

A. Yes.

35027 Q. And are some of your mills located in territory where, close to the mill, there is a large consumption?

A. Yes.

Q. And are some of your mills located in territories where, close to the mill, there is a small consumption?

A. Yes.

Q. Does that indicate that the answer might be different as to different mills?

A. Yes.

35028 JOSEPH S. HELLER being called as a witness for the Respondents, and being first duly sworn, testified as follows:

Direct Examination by Mr. Hershberger.

I live in Chicago and am employed by the Universal Atlas Cement Company. I have been employed in the traffic department of the company for a little more than thirty-two years and at the present time I am chief clerk in the Chicago traffic department.

Mr. Hershberger: I ask this document be marked for identification "Respondents' Exhibit 2467."

(The document was marked for identification "Respondents' Exhibit 2467.")

By Mr. Hershberger:

Q. I show you Respondents' Exhibit, for identification, No. 2467, and ask you to state whether you have seen that before.

A. Yes, sir; I have.

Q. Just state what it is, briefly.

35029 A. Well, it is a map of the neutral freight lines, that is, freightwise, as between various territories in the State of Texas.

Q. Did you prepare the map?

A. I prepared the map, with some slight mechanical assistance from my associates.

Q. What does the map purport to show?

A. Well, the map purports to show certain areas that, from a freightwise standpoint, are controlled by the various cement mills as indicated on map, and also the points of destination; that is, railroad points of destination, where the lowest freight rate is the same from two or more cement mills.

Q. Does the map indicate where the cement mills in the State of Texas are?

A. Well, to some extent, it does.

Q. How is that shown on the map?

A. That is shown by rectangular black lines around the points in the various areas.

Q. Does this map give any consideration to price bases in effect at the mills?

A. No, it does not. It is purely a freight rate map, and it is to railroad freight destinations only, where the carload freight can be delivered. It does not take into consideration any less-than-carload freight to destination points, nor does it take into consideration inland 25030 towns, where freight cannot be delivered.

Q. Now, are the neutral freight rate points that you mentioned various stations to which the freight rates from mills would be equal from two or more mills? Are they all indicated on that map?

A. They are all indicated on the map.

Q. In what way are they indicated?

A. They are indicated by black lines being traced over that portion of the railroad where these destinations are found.

Q. Did you make a list of all those neutral points to which freight rates were equal from two or more mills in the States of Texas?

A. Where the lowest freight rate was equal from two or more mills, I had a list of those points prepared.

Mr. Hershberger: I would like to have this document marked for identification as Respondents' Exhibit 2468, et seq.

(The documents were marked for identification "Respondents' Exhibits 2468-A to 2468-R.")

By Mr. Hershberger:

Q. Does Respondents' Exhibit, for identification, 2468-A to R, comprise all of the stations in the State of Texas to which there are freight rates equal from two or more mills?

A. This is a statement of all points in Texas comprising neutral points to which the lowest freight rate is equal from two or more mills. In other words, these 35031 neutral points have no other freight rates that are less than the rates shown on this statement.

Q. Now, do I understand you correctly to indicate that the lines on the map, Respondents' Exhibit, for identification, 2467, cover every station that is shown on this list, Respondents' Exhibit 2468-A to R?

A. That is correct.

Q. And you prepared this list?

A. I did.

Q. After the map, Respondents' Exhibit 2467, for identification, was drawn by you—that was drawn in pencil, was it not?

A. With crayon, black crayon.

Q. Did you make any copies of it?

A. Well, we had a tracing made by a draftsman of the neutral lines indicated in black on that map, and in addition to the neutral freight lines, the draftsman was instructed to make the outlines of the counties and the names of the counties as well as the outline of the boundary of the State, itself.

Q. Then what did you do with that tracing?

A. And from that tracing we had direct line prints made, which was a positive of the tracing, by a photographic process.

Mr. Hershberger: Will you mark this for identification as a Respondents' exhibit?

(The document was marked for identification "Re-
35032 spondents' Exhibit 2469.")

By Mr. Hershberger:

Q. I show you Respondents' Exhibit, for identification, No. 2469, and ask you if that is one of the prints that was made by means of the tracing from the original map that you made, Respondents' Exhibit 2467?

A. Yes, sir, that is one of the maps. That was made from the tracing, or one of the prints that was made from the tracing.

Q. Are there any differences between this print, 2469, and the original map, 2467? If so, just explain in what respect they differ.

A. Well, no I don't think there are any differences. The tracing was made from the map, and the print was made from the tracing, so they should be identical.

Q. I mean by that, certain material is shown on one that—

A. Oh, on the print we colored the territories in which certain cement mills were controlling; that is, the territories in which their freight rate would be lower than from any other mill. There are some exceptions to that shown in the colored areas by the black lines in the colored areas that indicate isolated cases where there are neutral points within those general areas.

Q. What was the purpose of making the print rather than using the original map with colors on it?

35033 A. Well, it was a little difficult to take a map so congested as the Rand-McNally map on which the original lines were drawn and visualize the condition of that character, and we wanted to remove a great deal of the detail on the map and still retain enough of it so that the territories could be identified by counties.

Q. Then would you say that the print, Respondents' Exhibit 2469, together with the list of neutral points, shows the same thing as would be shown by an examination of the original map from which the print was made, the original map being Respondents' Exhibit 2467?

A. Well, it would show the same thing, so far as the territory is concerned, except that it would not show the detail of the towns on the map.

Q. That is, towns within the various areas.

A. Towns within the various areas, or on the neutral lines.

Q. Yes.

Every station in Texas to which there would be equal lowest freight rates from two or more mills is shown on the list, Respondents' Exhibit 2468?

A. Well, that is true with the exception of mills at three locations. For example, the Dallas territory, there are two mills in the Dallas area from which the rates are equal throughout Texas as well as throughout their own territory, and where the rates from those two mills were

the lowest, we did not differentiate as between the
35034 rates from those two mills. In other words, that entire territory that is shown as Dallas territory, if we took into consideration the two mills at Dallas, that entire territory would be neutral, and we didn't attempt to show that because the rate from those two mills are the same, and were the lowest of any rates—we did not show the difference between those two mills.

Q. In other words, those mills that are located at the same point, and having similar freight rates all over the States, were considered as one location.

A. Eagle-Ford and Harry's, which would take the Dallas rates. Now, the same thing is true of mills at San Antonio, Texas and Fort Worth.

Q. Fort Worth or Houston?

A. Fort Worth. I think it is Fort Worth.

Q. Is there more than one mill at Fort Worth?

A. I think so. I might be mistaken. I would have to refresh my memory before I could answer definitely on that. I am under the impression that it was Forth Worth, but it might be possibly Houston, but, at any rate, there are similar conditions at other places in Texas besides the Dallas territory of Eagle-Ford and Harry's.

Q. Referring to the colored exhibit, being Respondents' Exhibit 2469, what would you say with respect to the various colored locations that are shown on that map? What would they indicate?

35035 A. Well, the colored areas, themselves, without regard to the neutral lines—the neutral points indicated by black lines within those territories show the territory where the freight rate from the mills located therein are controlling.

Q. Are lowest, do you mean?

A. Are lowest; that is it.

Q. By "controlling" you mean "lowest"?

A. That is what I mean by lowest. That is, the freight rate from the cement mill in those territories was lower than from any other mill.

Q. Referring to the purple area on the map, what is the mill in the purple area, if you know?

A. That is the Universal mill at so-called Waco, Texas. The rates are based on the Waco mill.

Q. Does your previous testimony mean to indicate that

within the purple area the freight rate from the Waco mill is lower than the freight rate from any other mill in Texas or outside of Texas into the purple area?

A. That is correct, with the exception of where you have black lines within the area.

Q. Sort of islands within?

A. That is the isolated neutral points within that area.

Q. And, further, the freight rates from that Waco mill to the black lines surrounding that purple area are equal?

35036 A. They are equal to at least one other mill than Waco.

Q. I see.

Mr. Hershberger: I would like to offer into evidence the print, being Respondents' Exhibit No. 2469. Also, I would like to offer in evidence the list of neutral freight rate points in Texas, being Respondents' Exhibit 2468-A to R. And I have no objection, although I do not specifically offer the original map—it is in rather bad shape and it may be used for examination, or if Counsel for the Commission would prefer to have it in, I have no objection to it going in.

Trial Examiner Norwood: You offer it for checking?

Mr. Hershberger: Yes.

Mr. MacIntyre: May I inquire of the witness as to a question or two on voir dire?

Examination on Voir Dire by Mr. MacIntyre.

Q. In response to a question of Mr. Hershberger, in which he asked you about Respondents' Exhibit 2467, for identification, I understand you to say that the black lines appearing thereon, that is, in outlining certain territory, outlined such territory as was controlled by the various cement mills within such outlines?

A. With the exception of the isolated spots

35037 within those areas.

Q. Yes.

A. That is correct.

Q. That is based on the assumption, isn't it, Mr. Heller, that you start with a zero at each of the shipping points within the territories?

A. Well, there is no zero; that is, you have no absolute

zero on freight rates from a certain mill. There is always a measure of some freight rate from that particular mill.

Q. I know, but when you start to figure the application of that freight rate, you figure it only as a freight rate; that is, from nothing to 10½ cents, or whatever the freight rate is?

A. Well, possibly, that would be approximately correct, although there is nothing that corresponds exactly to the nothing that you speak of. See? There is no point to which you can ship for nothing; in other words, for any particular mill.

Q. Oh, no, I don't think you have the question.

A. Perhaps I don't understand you.

Q. When you figure freight rates, say, from Waco to Palestine, you are figuring there a freight rate that is with respect to its application on a shipment of cement plus some figure from Waco?

A. No.

35038 Q. As a general proposition, though, when you figure on a shipment of cement?

A. No, this is purely a freight rate neutral—this is purely a spotting of points from which—purely a freight rate—meets the rate of some other mill without any other consideration than the freight rate itself.

Q. So we go back to the original statement I made. The assumption is, then, that nothing is added to the freight?

A. There is nothing added.

Q. Just the freight itself?

A. That is correct.

Q. All right. But when you speak of territories controlled by various cement mills, that territory changes with respect to changes in so-called basing point prices at those various mills; is it not?

Mr. Hershberger: He isn't discussing that.

Trial Examiner Norwood: He limited or conditioned that in his statement there. He said that it controlled so far as the lowest freight was concerned.

The Witness: I said—

Trial Examiner Norwood: I am not trying to repeat his words, but that was the sense of it.

The Witness: I said that was the territory to which the freight rate alone from each producing point was less than

from any other mill in those colored areas with the
35039 exception of the isolated lines in those areas.

Mr. MacIntyre: If Your Honor please, what I want to try to understand from the witness, if it is possible, is as to whether or not these various colored territories appearing on Respondents' Exhibit, for identification, 2469, would change in their relation to each other if we take into consideration the facts as they are rather than an assumption that he has; that is, just the application of freight rates, and nothing else, as factors.

The Witness: Naturally, if you took another factor into consideration, why, the picture would change.

By Mr. MacIntyre:

Q. That is, a factor such as a basing point at Fort Worth of $1.70, and one at El Paso of $2.15?

A. You mean interjecting a price in that?

Q. Yes.

A. Certainly, that would change the picture.

35040 Q. Mr. Heller, referring to Respondents' Exhibit, for identification, 2467, when did you prepare that?

A. That was prepared the middle of last summer, the middle of the summer of 1939.

Q. For use either in this case or the Texas case?

A. It was prepared at the request of Mr. Hershberger for use as an exhibit in the Texas—in the case of the State of Texas against the cement companies in that State.

Q. That is, against the Lone Star Cement Corporation, et al.?

A. Well, I presume the Lone Star was in it. I don't know. I have no knowledge of that.

Q. What sources of freight rate information did you use in the preparation of these exhibits?

A. We took the freight rates as we found them in The Cement Institute rate book.

Q. You didn't use the official tariffs at all?

A. No, we did not. We took the rates as we found them in the Institute books, which we had checked and
35041 found them to be correct.

Trial Examiner Norwood: You checked them with the official tariffs?

The Witness: We had checked them against the official tariffs and found them to be correct.

By Mr. MacIntyre:

Q. And in using the freight rates from—the freight rate books from the Institute, The Cement Institute, did you take them in a per hundredweight rate for a minimum car of 132 barrels?

A. No, we took them in cents per hundred pounds.

Q. You didn't figure any differences that would result in different sized cars?

A. No, we did not. This is purely a freight rate statement in cents per hendred pounds, a freight rate picture in cents per hundred pounds.

Q. You don't know, then; or you can't tell us at this time how much these black outlines would change, if any, if you had computed the application of the freight rates as to shipments in minimum cars of 132 barrels each?

A. No, I could not. I did not take that into consideration at all.

Q. What were the effective dates of the freight rate compilations of The Cement Institute which you 35042 used in the preparation of this map?

A. The effective date of—you mean the original effective date of the rates?

Q. Well, the effective date of the freight rate books that were so used as well as the correction sheets used in connection therewith.

A. Well, we took the rates there as of the date on which the statement was made. I think it was in July some time, in 1939. I don't know whether I have any papers from which I can identify the exact date or not, but my impression is that it was the latter part of July.

Trial Examiner Norwood: Doesn't the map represent conditions as of the date you named?

The Witness: That is it exactly.

Trial Examiner Norwood: And the rates you used from the rate books are the rates obtaining on that date?

The Witness: That is correct; yes, sir.

By Mr. MacIntyre:

Q. Well, was that the last freight rate book of The Cement Institute that you used?

A. Yes, that is the last one.

Q. Do you recall the number of it?

A. I don't recall the number of it.

Q. Or the effective date?

A. I don't recall whether—I don't recall exactly. I possibly could give the information later, but I
35043 can't recall what the number of it was.

Q. Would you be in a position to have it available before your cross-examination is completed here?

A. I think I would. I think I would. I am sure I would.

Q. As well as the correction sheets that you used along with it?

A. Well, I don't believe that I can show you those.

Q. Well, the rates that you worked out on here would be dependent in part upon the correction sheets you used along with the books, wouldn't they?

A. Whatever corrections were made were made in the books.

Q. That is, you copied the correction sheets into the books?

A. That is right.

Q. And the books would show the corrections?

A. Yes.

Q. But would not show the dates of the corrections; is that correct?

A. No, I believe not.

Q. Will you have the books here?

A. Yes, I will.

Mr. MacIntyre: Our only objection to the offer of the three exhibits, if Your Honor please, is that we don't think that they are material sufficiently to warrant their being received in evidence, and we can add to that the
35044 further objection that we don't think that the two of them that are offered should be received unless and until 2467 be included with them as an offer.

Mr. Hershberger: I am perfectly willing to offer 2467. The only reason I didn't was that it is badly worn and it has pencil or crayon marks on it which can get smudged or erased.

Trial Examiner Norwood: It isn't just clear what the counsel wants to show by these maps.

Mr. Hershberger: I wish to make a statement in that connection now.

Trial Examiner Norwood: Yes.

Mr. Hershberger: Our position is that this is material because it indicates the zones of the various mills in the

State of Texas, this State being taken as an example of what would happen all over the United States if cement were sold on a f. o. b. mill basis. In other words, it shows that each mill would have a monopolistic zone. It indicates graphically about what the size of the zone would be, and shows how it would be impossible for one mill to get into the territory of another mill except at points where, due to some peculiarity of the freight rates, there happened to be an equal freight rate point.

Now, this particular map is on the assumption that there was no difference in base prices. We will have 35045 another map which we will present later that will take base prices as they exist at the present time. I propose to have this map prepared because we don't know what the base prices will remain at; therefore, you can take a particular State and make a map on that basis, but next week there might be a change in base prices, and, therefore, I thought it would be very helpful to have one map that would be confined to freight rates alone. Therefore, if base prices were the same at all mills, irrespective of what that sameness might be, what-level, this map would illustrate, then, the monopolistic zones which each mill in Texas would have.

Trial Examiner Norwood: Didn't we go into that fully on this last witness?

Mr. Hershberger: We have gone into some oral evidence on it, but I don't think there is anything in the record, Your Honor, that will illustrate as graphically or as completely how that would actually work out as this.

Trial Examiner Norwood: We had a very large map there that was marked off.

Mr. Hershberger: We didn't.

Trial Examiner Norwood: And that situation was discussed.

Mr. Hershberger: That was some other Respondent.

35046 Trial Examiner Norwood: On the theory that the prices at the mill would be rigid, and so forth. Now, this is on the same theory, is it not?

Mr. Hershberger: I say that map was not from the Universal Atlas Cement Company.

Trial Examiner Norwood: No, I know that.

Mr. Hershberger: Of course, I don't know. I wasn't

present when the testimony of Mr. Hogan was given, except just at the end.

Trial Examiner Norwood: There was a great deal of testimony which was received on that general question.

Mr. MacIntyre: If Your Honor please, my statement as to the immateriality of this was, of course, with the thought in mind as to the receipt in evidence of Respondents' Exhibit 2460, and, of course, we contended at that time that even it was irrelevant. Now that it is in another piece of material of the same type while irrelevant as that was, in our estimation this is doubly immaterial because you already have it in the record, and now that the further offer has been expressed, or the purpose of the offer has been expressed by Mr. Hershberger, I would have to stress the objection to the pending exhibits on the ground that they are irrelevant. I attempted to determine from the witness, if you will recall, on voir dire, as to whether or not there was an assumption of equal
35047 prices or starting with an equal zero, so to speak, at each of the shipping points, and the witness seemed not to know that such an assumption had been used by either the comparison of the map or by his counsel, and now it does appear from the offer of Mr. Hershberger that that is the case, whereas it is not in accordance with the facts.

Mr. Hershberger: I don't believe there is any doubt about the witness' testimony; in other words, that it expressed the zones in which the freight rates were lowest.

Trial Examiner Norwood: I don't just see the relevancy of this map here.

Mr. Hershberger: Now, if Your Honor please, in this case—

Trial Examiner Norwood: There is one thing. Now, if you show that selling f.o.b. mill in a rigid price basis would create a local monopoly there, how would that refute any of the allegations of the complaint?

Mr. Hershberger: It would refute the allegations of the complaint that selling on the present method is unfair, is monopolistic and non-competitive. That is the very charge in this complaint.

Now, as I have said before—

Trial Examiner Norwood: It goes to the un-
35048 reasonableness of the restraint, if any?

Mr. Hershberger: It goes to the question as to

whether there is any restraint, and it goes to the question of whether there is any other method of selling that could be done that would permit the Respondents to remain in business. This is preliminary to some evidence which I propose to produce at a later time to demonstrate that the consumption of cement over the years that have been passed in these various zones will indicate with respect to some of these mills the consumption is not enough to permit those mills to exist if they were confined to that territory.

Trial Examiner Norwood: The previous witness was permitted to go into this thing thoroughly.

Mr. Hershberger: We don't know about the other map, or whether it is accurate, or anything of that sort.

Trial Examiner Norwood: In the interest of making the information full and complete, and permitting the witness to explain the situation, it was put in, but it was not to be considered a precedent for every one of these Respondents to put in similar maps for the same purpose on the same points that have been covered, and those are general points.

Mr. Hershberger: I don't think that has been attempted.

35049 Trial Examiner Norwood: It doesn't show any special situation with regard to this company that operates in Texas.

Mr. Hershberger: Yes, it does. It shows very specific situations. In other words, one of our mills is right on this map.

Trial Examiner Norwood: I will overrule the objection and receive these three exhibits, with the understanding that it is not to be considered a precedent for every other Respondent to put in other maps on this same question.

(The documents heretofore marked for identification "Respondents' Exhibits 2467, 2468-A to 2468-R, 2469," were offered and received in evidence.)

35050 By Mr. Hershberger:

Q. Mr. Heller, I show you Respondents' Exhibit, for identification, No. 2470, and I ask you to state whether you have seen that before.

A. Yes, sir: I have.

Q. State what that is.

A. This is an identical—a map made in the identical

way that the Resp. Ex. 2467 map was made, except that instead of freight rates only we took the existing price bases and added to those price bases the freight
35051 rate, and the result was the neutral price lines and zones based on those figures, to which zones the price would be less from one mill than from any other mills.

Q. You are referring to a map of the State of Texas, are you?

A. That is correct.

Q. And this map, as I understand it, shows the mill locations in the same way as did the Exhibit No. 2467?

A. Yes.

Q. That is to say, by rectangulars around the points at which there are mills, such as Waco, Houston, and so forth.

A. Yes, sir.

Q. This map shows all of the stations in the State of Texas at which a price made by adding together the freight rate and the base price from some mill would be equal from two or more mills?

A. That is correct.

Q. In other words, it shows all neutral price points in Texas?

A. It shows all neutral price points in Texas by the method that I have described.

Q. And the result is that you have a map showing zones around each mill or group of mills in Texas, in which, on the present price bases, the mill in the particular zone would have the lowest delivered price to all points within that zone?

35052 A. That is correct.

Did you make a tracing of that particular exhibit?

A. Yes, I made a similar tracing to that, made in the same manner as the tracing of the neutral freight lines.

Q. Did you have a print then made of that original map, to-wit, Exhibit, for identification, No. 2470, in the same manner as before, on a map that does not show all the towns and various other data?

A. Yes, sir; we had a map made from the tracing in the same manner.

Mr. Hershberger: Will you mark this for identification, please.

(The map was marked for identification "Respondents' Exhibit 2471.")

By Mr. Hershberger:

Q. Showing you Respondents' Exhibit, for identification, No. 2471, is that a print made by the use of tracing from the map that you have just been describing, to-wit, Respondents' Exhibit 2470?

A. Yes, sir.

Q. And is the date shown on Respondents' Exhibit, for identification, 2471, with respect to the neutral price points, the same as shown on the original map?

A. Yes, sir.

Q. Exhibit 2470?

35053 A. Yes, sir.

Mr. Hershberger: Will you mark this for identification, please?

(Documents were marked for identification "Respondents' Exhibits 2472-A to 2472-N.")

By Mr. Hershberger:

Q. Showing you Respondents' Exhibit 2472-A to N, inclusive, will you state whether that document was prepared by you.

A. Yes, sir.

Q. And if so what it is.

A. Well, it is a statement of the neutral price points in the State of Texas made in the manner described; that is, the existing base prices plus the freight rate.

Q. Would you say that the black lines outlining the various zones shown on the map, Exhibit 2471, for identification, includes every point shown on the list that you have just testified to, 2472-A to N?

A. Yes, sir; it does.

Q. Explain the figures opposite the names, if you will, what those figures represent in columns opposite the names of towns or stations.

A. Those—you mean these figures in these columns (indicating)?

Q. Yes, the figures in the column to the right of the names of the stations.

35054 A. Those represent the base prices shown—or the price bases shown at the top of the list plus the freight rate in cents per barrel. That is the gross figure.

Trial Examiner Norwood: That makes the delivered price then?

The Witness: That makes the delivered price; yes, sir.

By Mr. Hershberger:

Q. And those figures are given under the name of the mill which would make that price, are they not?

A. That is correct.

Q. And under the names of some other mills you have some stars, I believe.

A. Well, that is explained in the heading of the statement, that instead of duplicating the figure, the asterisk indicates that the same delivered price, or the price at these mills under which the asterisk appears, is the same as the price first appearing under the first mill shown.

Q. In other words, instead of copying the same figure three times, the figure was placed down once, and the asterisk opposite means the same figure would apply; is that right?

A. That is right.

Q. Take, for example, the station Adrian, and after the word "Adrian" appears in parenthesis the word "Oldham." What does that mean, for example?

35655 A. The word in parenthesis opposite Adrian is the town in which the county in which Adrian is located, and that shows that the delivered price based on the manner I have described from Eagle-Ford is $3.23, and under the method I described of using the asterisk, being the delivered price from Harry's and North Fort Worth would be also $3.23.

Q. In other words, that indicates that the point Adrian is a neutral price point?

A. As between three—

Q. As between the three mills, to-wit, Eagle-Ford, Harry's, and North Fort Worth.

A. That is right.

Q. And is that same method followed throughout the entire statement?

A. That is correct; yes, sir.

Mr. Hershberger: I offer in evidence Exhibits 2470, 2471, and 2472-A to N (handing the said exhibits to Commission's Counsel).

Mr. MacIntyre: May I ask a question on voir dire, Your Honor?

Trial Examiner Norwood: You may.

Examination on Voir Dire by Mr. MacIntyre.

Q. Mr. Heller, referring to Respondents' Exhibits, for identification, 2470, 2471, and 2472, at what time
35056 did you prepare these?

A. They were prepared in the middle of the summer of 1939, at the same time, or practically at the same time, as the neutral price lines were prepared, for the same purpose.

Q. They were prepared at the same time and for the same purpose as Respondents' Exhibits 2467, 2468, and 2469?

A. That is correct.

Trial Examiner Norwood: Do they cover the same times and freight rates?

The Witness: That is right.

Trial Examiner Norwood: As the previous exhibits here, 2467, 2468, and 2469?

The Witness: Yes; that is true.

Trial Examiner Norwood: They are to be studied together? is that the idea?

The Witness: That is right.

Trial Examiner Norwood: Thank you.

By Mr. MacIntyre:

Q. Were they prepared from the same sources, as to freight rates?

A. Yes, sir.

Q. Is it your testimony that you did not use official tariffs in any connection in the preparation of any of these maps?

A. No, sir; we did not.

Q. You prepared them all under the same circum-
35057 stances; that is, at the request of Mr. Hersh-berger?

A. Yes, sir.

Q. In view of the pending case, in Texas?

A. Yes, sir; that is right.

(The documents heretofore marked for identification "Respondents' Exhibits 2470, 2471, and 2472-A to 2472-N," were offered and received in evidence.)

By Mr. Hershberger:

Q. Mr. Heller, in connection with your work in the traffic department of the Universal-Atlas Cement Com-

pany, have you had occasion to examine into the freight rate structure in Texas to determine whether there are or are not short-haul rates in Texas?

A. Yes, sir; I have.

Q. What can you say in that respect?

Mr. MacIntyre: I object. It is irrelevant and immaterial to any of the issues in the case.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: What was the pre-
35058 vious question?

(Previous question and answer read.)

Mr. MacIntyre: As to whether he has made any finding as to what the facts are relating to short-haul railroad rates in the State of Texas is irrelevant and immaterial.

Trial Examiner Norwood: I think he may tell us that. Counsel has not indicated the purpose of it. I am assuming that it bears upon the delivered prices.

Mr. Hershberger: I am proposing to show short-haul rates, Your Honor, in connection with later testimony that we will develop as to the absence of trucking in Texas. In other words, I think it will appear that the short-haul rates and low rates which exist bear very decidedly on the economics of trucking in Texas, and that is the purpose of it. This is a freight man, and I would rather ask him than a sales man, with respect to that.

Mr. MacIntyre: That statement concerning his offer of proof clearly shows the irrelevancy of the line; that is, as to whether or not there existed short-haul rates, railroad rates, if you please, in the State of Texas that had anything to do with the attitude of any one towards the trucking of cement in the State of Texas, and it is irrelevant to the issues.

Trial Examiner Norwood: Suppose you do show
35059 that there were short-haul rates, and, therefore, that they had no interest in trucking?

Mr. Hershberger: That will destroy the inference which is made, or the allegation which is charged that we have prevented trucking by collusion.

Trial Examiner Norwood: That is, your particular Respondent?

Mr. Hershberger: That is our position.

Trial Examiner Norwood: I do not see that that shows it one way or the other.

Mr. Hershberger: If we can show that it was not economical to truck, even for short distances in Texas, does not that destroy the inference of collusion?

Trial Examiner Norwood: Is there any evidence that any of the companies had any conferences about trucking?

Mr. MacIntyre: There is evidence in the record to the effect that the officials of this company, and other cement companies, with mills in Texas, had conferences with competitors and with railroad officials and with dealers, looking towards the elimination of the truck transportation of Portland cement in the State of Texas, and what is offered here now does not meet that.

Trial Examiner Norwood: I do not see how your proffered testimony meets that at all, to show that the trucking was not profitable.

35060 Mr. Hershberger: Well, we have to start with a basis. Now, that is not the whole story, but you have the first line, whether there are low rates in Texas, and then you have to show whether those rates could compete with trucking costs in Texas.

Trial Examiner Norwood: Granting that that is true, you can make an offer of proof there, but I think I am going to exclude that as irrelevant.

Mr. Hershberger: Then, I should like to make an offer of proof by the witness, Joseph S. Heller, that there are short-haul rates, railroad rates, in the State of Texas, that those rates have been in effect as short-haul rates for a period since March 29, 1934, and that these short-haul rates, if proved, would be rates graduated from 4 cents per hundredweight for distances of up to 20 miles from the mill, graduated to various steps up to a rate of 10½ cents per hundredweight for distances from the mill of between 70 and 75 miles, the rates in between and for shorter distances varying in a way that could be shown if this witness were allowed to make that proof.

I offer to prove that were these short-haul rates shown, it would be proof that it would not be economical for truckers in the State of Texas to haul their cement by trucks, in their own trucks, in competition with the
35061 railroad rates so named.

Trial Examiner Norwood: You mean not economical for the dealers to do it?

Mr. Hershberger: That is exactly it.

Trial Examiner Norwood: Consequently, there would be no incentive for agreement.

Mr. Hershberger: That is exactly it.

Trial Examiner Norwood: And for any consultation in regard to it?

Mr. Hershberger: That is exactly the offer of proof that I make.

Trial Examiner Norwood: I think Counsel may show that.

Go ahead. I will overrule the objection.

Mr. Hershberger: Will you go back to my question, please? I have forgotten the question that I asked before. Will you please go back and read that question?

(Pending question read.)

A. Well, we found that the State of Texas issued a circular authorizing short-haul rates for application within a radius of 75 miles of each cement mill in the State of Texas.

Trial Examiner Norwood: When was that?

The Witness: We have the date of the circular here. I can't recall from memory.

By Mr. Hershberger:

23462 Q. Let me hand it to you to refresh your recollection. That is the copy of the circular, is it, not?

A. It is a copy of the circular. It took effect July 1, 1934.

Q. Will you state what those rates were, please, and for the distances from the mill?

A. Well, do you want me to repeat each particular break?

Q. Yes, there are only eight or ten.

A. It starts 20 miles and less, 4 cents a hundredweight; 25 and over 20, 4½ cents a hundredweight; 30 miles and over 25, 5 cents a hundredweight; 35 and over 30, 6 cents per hundredweight; 40 and over 35, 6½ cents a hundredweight; 45 and over 40, 7 cents a hundredweight; 50 and over 45, 7½ cents a hundredweight; 55 and over 50, 8½ cents a hundredweight; 60 and over 55, 8 cents a hundredweight; 65 and over 60, 9½ cents a hundredweight; 70 and over 65, 10 cents a hundredweight; 75 and over 70, 10½ cents a hundredweight.

Q. Mr. Heller, are those rates still in effect in the State of Texas?

A. They are.

Q. Do your have tariff documents from which you base that statement?

A. Yes, sir.

Q. And those are the documents you hold in your hand, are they?

35063 A. Well, the current tariff isn't here, but you have the current tariff there.

Trial Examiner Norwood: Well, that is when those first went in, in 1934?

The Witness: Yes, sir.

By Mr. Hershberger:

Q. Have they been in effect continuously since July, 1934, to-date?

A. Yes, sir; they have.

Mr. Hershberger: I think that is all we can develop from this witness in that respect. We are through. You may cross-examine.

Trial Examiner Norwood: Examine him.

Mr. Hershberger: Do you want to look at these documents from which he has refreshed his recollection?

Mr. MacIntyre: I would like to.

(Paperwritings were handed to Mr. MacIntyre.)

Cross-Examination by Mr. MacIntyre.

Q. Mr. Heller, on this last point, can you inform us as to what extent cement manufacturers, through the officials of The Cement Institute, organized cement dealers through their associations, including the National Retail Lumber Dealers Association, and railroads through their association, and representatives of such association, collaborated in working out applications for the institution of

35064 these short-haul rates which became effective July 1, 1934, in the State of Texas, and about which you have just testified?

A. I know nothing of any collaboration of that kind. The only thing that I do know from the records that I have is that that order of the Texas Commission was the result of an application by the carriers. That is the only thing I know about that.

Q. You do not know to what extent cement manufacturers and organized cement dealers through the officials

of their respective trade associations collaborated and worked out those applications with the carriers before it was submitted to the State of Texas; do you?

A. I don't know that they did that.

Q. Well, you do not know as to what extent they did it?

A. I don't know that they did it at all.

Trial Examiner Norwood: I think he answered the question.

By Mr. MacIntyre:

Q. Do you know how long before these rates became effective in Texas that your company had announced a policy of discontinuing deliveries for—that is, deliveries to buyers' trucks at their mills; that is, at a number of its mills?

A. I know nothing about that at all.

Q. You, as a traffic man of your company, do know that your company discontinued back in 1932 the

35065 unrestricted deliveries of cement?

A. No, I don't know that.

Q. To buyers' trucks?

A. I don't know that.

Q. You know nothing about any of those operations on the part of your company?

A. No, sir.

Q. You do know that it has placed restrictions in the form of a 15-cent-per-barrel surcharge for the delivery of trucks at its Buffington, Ind., mill; don't you?

A. I don't know it of my own personal knowledge. I have heard talk of that, but I do not know of it of my own personal knowledge.

Q. Haven't officials of your company informed you on that point?

A. No, they haven't told me anything of that kind. I couldn't say today whether that differential is on there, or whether it isn't.

Q. How do you learn about these restrictions that have been placed on cement deliveries to trucks at the mills of your company?

A. I don't know that.

Q. You said that you have learned something about it. What have you learned?

35066 A. I have heard it discussed, not with me, but I have heard the discussion of a differential, but

when it was instituted, if it was instituted, or the duration of it, I had no knowledge of it; no specific knowledge.

Q. Well, when you were in these discussions among representatives of your company, you heard something said about the date on which it was instituted, didn't you?

A. No, not the date on which it was instituted. I haven't the remotest idea.

Q. Whom did you hear discussing it?

A. Oh, I have heard the traffic officials discussing it as between themselves about a differential, but when it was instituted, if it was put on, or the duration of it, I haven't any knowledge as to that.

Q. Mr. Frank E. Guy is general traffic manager of the Universal-Atlas Company, and he didn't inform you about that matter?

A. I have heard him discuss it, yes.

Q. Did he tell you about any of the meetings that he had with other cement manufacturers' representatives and with dealers and officials of carriers concerning applications for short-haul rates for the purpose of discouraging transportation of cement by trucks?

A. No, sir; I don't know that he ever made an application. He never told me if he did for those short-haul rates.

35067 Q. You don't know but little, if anything, about Mr. Guy's activities in that connection?

A. I do not. I don't know that he had anything to do with the application of these short-haul rates. My understanding is that they were made by the carriers.

Mr. MacIntyre: This morning I believe that Counsel for the Respondents, as well as the witness, indicated that they would have available a book.

The Witness: Yes, I have that.

Mr. MacIntyre: From which these freight rates were determined for Respondents' Exhibit—

Mr. Hershberger: Yes, the witness has those books in his briefcase, if he may be permitted to step down from the stand.

(The witness produces a book.)

By Mr. MacIntyre:

Q. You have the freight rate book?

A. Yes, sir.

Mr. MacIntyre: I would like to ask that be marked for identification, if you please.

(The book was marked for identification "Commission's Exhibit 3247.")

By Mr. MacIntyre:

Q. Now, this freight rate book, marked for identification, as Commission's Exhibit 3247, I understand, Mr. Heller, is the source of freight rate information to
35068 which you resorted in securing information in preparation of Respondents' Exhibits 2467, 2468, 2469, 2470, 2471, and 2472; is that correct?

A. That is correct.

Mr. MacIntyre: I would like to inquire at this time whether or not Mr. Hershberger and the witness will permit us to retain this booklet for the purpose of running a check on these maps and tabulations, a thing that we were unable to do this morning?

Mr. Hershberger: It would be entirely agreeable.

By Mr. MacIntyre:

Q. Mr. Heller, referring to Respondents' Exhibit 2472-A to N, I believe you stated that the basing point prices that are shown at the head of each of these columns were the bases in effect as of July, 1939?

A. That is right.

Q. Do you know how long they had been in effect?

A. No, sir.

Q. Or whether they continue in effect?

A. I couldn't say.

Q. But they were in effect at those levels as of that date?

A. That is right.

Q. That is, as of July 1, 1939?

A. That was more towards the middle or the latter part
35069 of July than the early part of July, to the best of my recollection. I think one of those statements that are dated there, perhaps, would show you nearer to the date.

Q. Calling your attention to a date appearing in the lower lefthand corner of Respondents' Exhibit 2467, is that the date on which you found those bases effective?

A. That is right.

Q. That is July 27, 1939.

A. That seems to be June 27, unless my memory is faulty.

Q. June 27th.

A. Approximately that.

35070. Q. Mr. Heller, have you read the testimony of other witnesses who have testified in this case on behalf of Respondents, as well as the Commission; that is, especially the traffic men?

A. No, I have not. I have not read it. It is too voluminous. I have not had the time to do it. I have seen them, but I have not read them.

Q. Some of it has been called to your attention, then?

A. No, I have not discussed it, even.

Q. Under what circumstances have you seen it?

A. I have seen the file of it in our sales department; that is, in the case, and I have seen copies of certain periods of these little papers, about that thick (indicating), that came through me, and I pass them on to our traffic manager, and that is the extent of my knowledge of the testimony.

Mr. MacIntyre: That is all. Thank you.

FREDERICK L. STONE, being called as a witness for the Respondents, and being first duly sworn, testified further as follows:

Direct Examination by Mr. Hershberger.

I am vice president of the Universal-Atlas Cement
35071 Company. Since 1932 I was vice president and general sales manager. On August 1, 1937 I dropped the title of general sales manager, continuing my position as vice president. For about ten years prior to that I was in charge of sales as vice president and general sales manager. It went back to the time when the Cement In-
35072 stitute was organized. I became general sales manager in the summer of 1928, vice president and general sales manager sometime in 1932, and vice president in 1937.

Q. I show you Federal Trade Commission's Exhibit 761, which has been introduced in this case, being a printed pamphlet, containing articles of association and the Compendium of Established Terms and Marketing Methods

of The Cement Institute, and referring to the Compendiums which begins at page 11, I believe, I will ask you to state whether you made any distribution of that Compendium at or about the time it was issued, or since that time to your various sales managers?

A. We did not.

Q. To what extent, if any, did the Universal-Atlas employees or officers receive copies of that?

A. There were some three or four copies received in our general offices, and we gave a copy each to persons in the general sales office in Chicago, and I am quite sure that it did not go to anyone outside of the general sales office, and certainly not to any of our sales offices outside of Chicago.

Q. Did your salesmen in the field get copies of it?

A. No.

Q. I show you Federal Trade Commission's Exhibit 136-AA to PP, and referring to the page of that exhibit marked 136-EE, I call your attention to the fact that 55073 the name "Fred Stone" is indicated as being present, along with D. H. MacFarland, as representatives of the Universal-Atlas Portland Cement Company, at a meeting of The Cement Institute which was held on January 7, 1930, in Chicago, Ill., and I would like to have you state whether the Fred Stone there indicated is yourself.

A. It is.

Q. You were present at such a meeting.

A. I was.

Q. With Mr. MacFarland.

A. Yes.

Q. Was your company at that time a member of The Cement Institute?

A. No.

Q. Will you please explain why you were present at that meeting?

A. January 7th was—

Q. What year, please?

A. —1930—was just about the time that we had acquired or were acquiring the assets of the Atlas Portland Cement Company. That company had been a member of The Cement Institute we had been informed, a member for certain districts in which the Institute operated, or contemplated operation. Our old company, that is, our company before the change of name from Universal Portland

to Universal-Atlas had not been a member of the Institute, and I went to that meeting with a distinct purpose
35074 of having it clearly understood that the old membership of the Atlas Company was not being continued, and that the Universal-Atlas Company was not a member of the Institute.

Q. I show you Federal Trade Commission's Exhibit No. 138-A to—well, it is marked here 138-2 to 138-8, although appearing at the top of the exhibit appears the designation 136-A to T, and some subsequent letters, but whatever the numbering that was used, it purports to be the original Code of Ethics of The Cement Institute.

I will ask you to look at that and state when you first saw a copy of that Code of Ethics and when you first became acquainted with it, if you are acquainted with it.

A. To the best of my knowledge and belief, I never saw this exhibit, as you have described it, until it appeared either in this present proceeding or in another case, another recent case.

Q. Do you know whether your company, the Universal-Atlas Cement Company, or by its prior name, Universal Portland Cement Company, was a signatory to that Code of Ethics?

A. I know that it was not.

Q. Your company joined The Cement Institute during N. R. A. days, did it not?

A. Yes, in the summer of 1933.

Q. Mr. Stone, from your experience as general sales manager, you know approximately the number of
35075 customers you have; do you not; that is, accounts?

A. I don't know that I can recall the number of accounts. It does stick in my mind that we have in the neighborhood of 6,000 dealer accounts.

Q. How vital are dealers in the distribution of Universal-Atlas cement products?

A. Why, I would say they are the most vital thing in the distribution of our product.

Q. They take more of your cement than other classes of buyers?

A. Oh, yes, always have.

Mr. Hershberger: Will you please mark this for identification?

(The document was marked for identification "Respondents' Exhibit 2473.")

By Mr. Hershberger:

Q. I show you Respondents' Exhibit 2473, for identification, and ask you to state whether you have seen that document before.

A. Yes.

Q. Was it prepared by you or under your direction?

A. Under my direction, yes, and I had a good deal to do with the preparation of it.

Q. What does it purport to show?

35076 A. It shows the domestic shipments of our company in barrels for a number of years indicated at the top in each column, the total shipments being subdivided into shipments for each year direct to U. S. Government, direct to State Governments, to consumers other than federal and State Governments, and to dealers. It shows in number of barrels shipped and also shows the percentage of those barrels to the total.

Q. In other words, indicating the percentage in the years shown of the sales to those various classifications that you named?

A. Shipments, yes.

Q. Of shipments, I should say.

Mr. Hershberger: I offer that in evidence (handing the document to Commission's Counsel).

Mr. Wooden: May I ask a question of the witness on voir dire?

Trial Examiner Norwood: Certainly.

Examination on Voir Dire by Mr. Wooden:

Q. Mr. Stone, do the figures showing the sales to dealers include sales for W. P. A. purposes?

A. If there were any such sold by dealers, it would include that.

Q. You do make sales on W. P. A. work through dealers; do you not?

A. We make sales to dealers who, in turn, re-sell 35077 and I believe some of their sales are to W. P. A. interests.

Q. You don't have any breakdown of the proportion of these figures that apply to such sales?

A. No.

Direct Examination (Continued) by Mr. Hershberger.

Q. Would you have any means in your records of finding what that was?

A. Oh, no. We could make a stab on it, but, obviously, there are some that we could get accurate and some that we could not get accurately.

Q. In other words, those would be dealers' records rather than your records?

A. Yes.

Examination on Voir Dire by Mr. Wooden.

Q. The same answer applies, does it not, Mr. Stone, to any other sales made to dealers, which were then furnished on Government projects?

A. I can best answer that by saying that that represents our total sales to dealers—total shipments to dealers. That is the last item on the exhibit.

Q. Yes, sir; and are there not a number of State Government jobs that are supplied to dealers, or by dealers to whom you sell?

35078 A. I cannot answer that question.

Q. You can answer this, can you not, that there are quite a number of jobs that you sell direct to dealers, or to contractors, that are then used on State Government projects?

A. I cannot answer that, Mr. Wooden, with any accuracy, because our records are not kept along that line. I can assume or I can guess.

Q. There are some? I am not asking you to specify the quantity.

A. Undoubtedly. Cement is used in many, many ways.

Q. Do you have a separate classification in your business of sales to contractors?

A. Are you speaking now with respect to our policy of selling or with respect to our records on which the statement is based?

Q. I want to know whether this statement takes account of sales made direct to contractors.

A. We show direct to consumers other than federal and State Governments, and that would include contractors.

Mr. Wooden: Subject to the witness' explanation, there is no objection.

Trial Examiner Norwood: It will be received as marked.

(RESP. EX. 2473, was offered and received in
35079 evidence.)

By Mr. Hershberger:

Q. Do you have any understanding with competitors of the classification on this exhibit that is entitled "Dealers," as to what that shall include?

A. Oh, no.

Q. Now, Mr. Stone, do you sell contractors direct in all instances where they use cement, if they come to you and ask to buy direct?

A. No.

Q. Your policy is what in that respect?

A. We sell direct to a contractor when the work on which he is to use the cement is of a designated kind. In many other instances we sell cement to dealers who will in turn re-sell to contractors.

Q. In connection with that latter class of work, whatever it might comprise, do your salesmen, in their daily routine, get in touch with contractors and endeavor to sell them the cement, which the contractor, in turn, would buy from the dealer?

A. Our salesmen are continually working along that line, as well as others, their efforts being to get the contractor who buys from the dealer to ask the dealer to furnish our brand of cement on the order.

Q. How do your salesmen then determine what
35080 kind of a price they can tell that prospective contractor or user would be charged by the dealer from whom he would buy the cement?

A. What you describe now, of course, would occur in our negotiations with the contractor before the purchase, or in some instances our salesmen work right with the dealer on the ground. In other instances we quote or name to the contractor—and perhaps "name" is a better word—a price that the dealer authorizes us to quote him, and we make that quotation for account of the dealer.

Mr. Hershberger: Will you mark this for identification, please?

(The document was marked for identification "Respondents' Exhibit 2474.")

By Mr. Hershberger:

Q. Showing you Respondents' Exhibit, for identification, No. 2474, will you state whether that is a typical ex-

ample of a quotation naming prices which the dealer has authorized you to quote, such as you have described in your oral testimony?

A. It is.

Mr. Hershberger: I would like to offer that in evidence (handing the document to Counsel for the Commission).

Mr. Wooden: It is objected to, Your Honor, as irrelevant and immaterial, and as not meeting any issue raised in the case, either by the pleadings or by the 35081 evidence.

Trial Examiner Norwood: What is it?

Mr. Wooden: It has to do with simply the kind of price that will be quoted by the dealer, or on behalf of the dealer. We are concerned here with prices quoted by the manufacturers rather than by the dealers.

Mr. Hershberger: What I propose to offer this exhibit to show, Your Honor, is that the manufacturer, the Universal-Atlas Cement Company, does not fix or determine the price at which one of its dealers can re-sell its cement. There have been some statements made in this case that I think indicate that Counsel for the Commission make the contention that, among other evils or abuses with which we have been charged, one is that we have fixed at times the re-sale price of our customers, to-wit, our dealers; and I wish to prove that that is not so, and this is a typical example here of how we do handle sales which are made by our dealers. We do not fix the re-sale price.

Trial Examiner Norwood: It is part of your pricing method?

Mr. Hershberger: That is right.

Trial Examiner Norwood: I think you may show that. Objection overruled. The exhibit is received as marked.

(RESP. EX. 2474, was offered and received in 35082 evidence.)

By Mr. Hershberger:

Q. I call your attention on that exhibit 2474, Mr. Stone, to the fact that one particular quotation, being the third in the list of quotations, does not contain the statement of the name of a dealer by whom the price has been authorized. Have you checked into that particular exhibit to see what the reason was for that?

A. Oh, these cases happen more or less frequently. It states at the top, "We take pleasure in quoting you," and so

forth. On the first item we quote that it is authorized by such and such a local dealer, and the same with the next one. The third item, however, has no reference to the name of any dealer, and it is a direct quotation on our own behalf.

Q. In other words, that is a type of sale which, under your policy, you would sell direct to the contractor?

A. That is right; yes.

Mr. Hershberger: Will you mark these various exhibits, please?

Trial Examiner Norwood: This Exhibit 2474, this bid for delivery, Baldwin, price authorized by the Heebink Lumber Company, local dealer, as I understand you sent the quotation directly to the contractor after being requested by the dealer to do so?

35083 The Witness: (Indicating.) Price authorized by the dealer.

Trial Examiner Norwood: He told you the price before you quoted it?

The Witness: That is right. We consult with him and quote a price really on his behalf.

Trial Examiner Norwood: I see.

Go ahead and mark them.

(The documents were marked for identification "Respondents' Exhibits 2475, 2476-A, 2476-B, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485-A and 2485-B, and 2486.")

By Mr. Hershberger:

Q. Mr. Stone, showing you Respondents' Exhibit, for identification, 2475, 2476-A and B, 2478, 2479, 2480, 2481, 2482, and 2483, I will ask you to state what those documents are.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

A. 2475 is a photostat of our company's letterhead, dated August 18, 1926, headed "Announcements," and addressed to dealers.

By Mr. Hershberger:

Q. That was sent out to dealers, I assume?

A. Yes, sir.

35084 Q. What is the next one?

A. 2476-A is a photostat—

Mr. Wooden: Pardon me. As far as the identification

is concerned, I think we can save time. I think I would be willing to stipulate that all these documents are what they purport to be on their face.

Mr. Hershberger: May I state it and see if it is all right? If not, we will strike it off and not have it appear.

Trial Examiner Norwood: Yes.

By Mr. Hershberger:

Q. Will you state that those documents that I handed you are a series of announcements to your trade, the first being dated August 16, 1926.

A. August 18.

Q. August 18?

A. 1926.

Q. And the last?

A. I hadn't looked at those in between.

Q. And the last being dated December 31, 1937, which were sent out by your company to your trade?

A. Yes.

Q. And calling your particular attention to the last two exhibits, being 2482 and 2483, did those apply to limited territory, or did they apply to your entire territory?

35085 A. 2482 related to Texas only.

Q. How about the other one, 2483?

A. 2483 related to the State of Florida only.

Q. And the other exhibits related to all of your territory with the exception of—or were there any exceptions whatever?

A. Some of these are so far back that I can't state from memory.

Q. But related generally to most—

A. Generally, these related to— will look at them a little closer—related generally to the rest of the territory.

Q. Do those various announcements cover all of the period during the time between August 18, 1926, and December 31, 1937? In other words, no period of time during which announcements were out that aren't in this group?

A. That group is complete I am quite sure.

Q. That group is complete.

Mr. Hershberger: We would like to offer those in evidence as being the various sales announcements of the Universal Atlas from 1926 to date.

35086 (RESP. EXS. 2475, 2476-A, 2476-B, 2478, 2479, 2480, 2481, 2482, and 2483 were offered and received in evidence.)

By Mr. Hershberger:

Q. Now, handing you Respondents' Exhibit, for identification, No. 2484, state what that is, please?

A. 2484 is a pencil memorandum showing the terms offered by our company to its customers.

Q. Over a certain period of time?

A. Beginning January 21, 1909, up to and including January 23, 1931.

Q. And was that prepared at your direction?

A. Prepared under my direction; yes.

Q. Recently?

A. October 26, 1938. It bears that date.

Q. Who prepared it? Who did the physical work of preparing it?

A. One of the people in our office.

Mr. Hershberger: I offer that in evidence (handing the document to Commission's Counsel).

Mr. Wooden: May I ask one question?

Trial Examiner Norwood: Certainly.

Examination on Voir Dire by Mr. Wooden.

35087 Q. Mr. Stone, do you say that this exhibit, 2484, includes all of the changes in your terms during a period of time that it purports to cover?

A. Yes, sir.

Q. And you vouch for its accuracy, do you?

A. Yes, sir.

(RESP. EX. 2484 was offered and received in evidence.)

Direct Examination by Mr. Hershberger (Continued).

Q. Now, Mr. Stone, during your experience as sales manager, have you found that your salesmen pick up announcements of competitors at times when they 35088 are out in the field selling cement?

A. Yes.

Q. What would you say with respect to the period of time that might elapse after an announcement is sent out by a competitor before you would begin to receive information from your salesmen that they had seen it in the field?

A. Oh, I would say anywhere from a few hours to a couple of days.

Q. Handing you Respondents' Exhibits, for identification, 2485-A and 2486, will you state whether those exhibits are announcements of competitors that were picked up by your salesmen?

A. They are.

Q. And, if so, has your salesman made any indication on them to indicate about when he picked them up?

A. 2485-A shows, in pen-and-ink writing, that it was picked up at some lumber company at Ottumwa, and initialed by "GSN." That is George Neil, then in charge of our Des Moines office.

Q. And does it indicate what time it was picked up with respect to the date of the announcement?

A. The announcement is dated February 20, 1935, and, as I said a while ago, Mr. Neil's note indicates that it was picked up on February 21, 1935.

Q. Now, referring to Respondents' Exhibit 2486, does that indicate with respect to the time when the
35089 announcement was picked up, and by whom it was picked up?

A. It is dated February 20th, and the pen-and-ink note on its face shows that it was picked up either on or prior to February 21, 1935, and it was picked up from a dealer in Middletown, Conn., whose name is mentioned on the face of it, by one of our salesmen, whose name is mentioned.

Q. Would you say that these are typical examples of the picking up of information by your salesmen in the field, issued by other competitors—other cement manufacturers?

A. Yes; information of all kinds.

Q. And would you say that sometimes information comes in to you by other sources than picking up in the field; by example, by telephone, or not?

A. Oh, yes; dealers telephone us, and we hear of it in various ways.

Mr. Hershberger: I offer those two, only as examples of numerous items of material of that kind, and as typical examples thereof.

Mr. Wooden: I thought Mr. Hershberger's question was, at the outset, directed to picking up price information in the field.

Mr. Hershberger: No; this relates to picking up announcements. I say that in view of the fact that we have been introducing our own various sales policies.

35090 (RESP. EXS. 2485-A, 2485-B, and 2486, were offered and received in evidence.)

By Mr. Hershberger:

Q. Referring again, Mr. Stone, to the various sales announcements, can you tell us which, if any, of those sales announcements were put out by the Universal-Atlas Cement Company before any announcements of a similar character had been put out by competitors, and which, on the other hand, were put out following announcements of a more or less similar character by competitors?

A. May I look at the one dated in 1926, it being so far back?

Q. Yes; take your time, sir.

A. In the case of 2475, I am unable to state whether we put that out ourselves without having seen some

35091 sort of a similar announcement from somebody else.

Q. That is back in 1926?

A. That is back in 1926. It is so long ago I just cannot remember.

Q. Well, how about the others?

A. In the case of 2476-A and B, we put out our notice after having seen a similar notice put out by a competitor.

Q. Had you any agreement with the competitor—

A. No.

Q. —that you would put out that announcement?

A. No.

Q. Take the next one, please.

A. 2478 was put out by us without any regard to what anybody else did or had done.

Q. What was the date of that one?

A. January 23, 1931.

Q. All right. Take the next one, please.

A. The next is 2479, dated March 6, 1931. We put that out without reference to what anybody else had done.

Q. Do you mean by that that you had not seen any announcement of anybody else of a similar character?

A. We had not seen announcements by anybody else to the best of my recollection.

Q. How about the next one?

A. 2480—

35092 Trial Examiner Norwood: Let me see that one.

The Witness: Those two. (handing documents to the Trial Examiner)

Trial Examiner Norwood: Thank you.

A. 2480, dated February 21, 1935, shows in the first line or two that we had reports that another company had put out notices, and reproduced the content of the other company's notices.

By Mr. Hershberger:

Q. Why did you do that?

A. I remember it perfectly, but I could tell you just as quickly by reading these three lines:

"Announcement of a policy for the sale of cement has been received by purchasers and reported to us by our salesmen and by many of our customers. We are in accord with the policy and reasons therefor, and beginning at once are marketing our cement in the manner described therein. The policy is printed below."

And then we—

Q. You had no agreement; had you—

A. No.

Q. —with the other company?

A. No.

Q. Go on with the next one, please.

Mr. Wooden: You might ask him the name of that 35093 company, and that would save me the necessity of doing it.

By Mr. Hershberger:

Q. What company was it, if you remember, put out the policy that you adopted?

A. Lehigh.

Q. Take the next one, please.

A. The next one is 2481, dated April 9, 1935. We put that out after we had seen a similar policy put out by another company.

Q. There, again, did you have any arrangement or understanding with the other company?

A. No.

Q. What is the next one?

A. 2482, dated July 25, 1935. We put that out after having seen a similar notice in Texas by another company, and I am not sure in my memory whether that was the Trinity Company or the Lone Star Company.

Q. Take the next one, please.

A. May I correct my last answer?

Q. Yes.

A. This July 25, 1935, policy I am quite sure was put

out after we had seen a similar one put out by the San Antonio Portland Cement Company.

2483 is dated December 31, 1937. It was put out, 35694 as I remember it, some week or two after we had seen similar announcements from two or three other companies, among them Lehigh, Penn-Dixie, and perhaps others.

Q. Now, you emphasized that in that particular instance it was put out a week or two afterwards. With respect to those other policies, would you say that, generally speaking, your policies had been put out where they followed similar policies of other companies within a shorter period than a week or two?

A. Yes, where the policy appealed to us and we knew the general situation in the trade. We made an effort to get it out as quickly as possible.

Q. Was there any reason why it was a week or two in the Florida case; that is, the policy that you have last described being the one that you said applied to Florida?

A. Florida had been—the cement selling conditions there had been somewhat different than elsewhere. I wouldn't say demoralized; I wouldn't say in a state of chaos, but they were unsettled, and we simply didn't put this out as quickly as we do sometimes.

Q. Would you say that that policy with respect to Florida, that is, the December, 1937, policy—did that make any change in your method of doing or transacting sales there from what you had been following the preceding two or three weeks?

A. I think that it took away to a slight extent some business that we had been selling to dealers, and 35695 under this we would sell if direct, and it was partly because of that that we had some hesitation about putting it out quickly.

Q. Mr. Stone, from your experience, do you have any definite opinion as to the necessity of putting out a policy to your trade when some competitor has put out a policy to its trade?

A. I think that we would be governed there largely by the content of the competitor's policy and our belief as to what probable effect it would have on the trade. Obviously, if a competitor put out a policy that we didn't like, and we thought wouldn't be beneficial to us, we would not follow it.

Q. Just what do you mean by putting out a policy? I have been using that expression, and so have you. Let's just make that clear.

A. I realize I use a lot of jargon.

If one company puts out a notice to the trade, if it is something that just strikes us right off the bat as being something that is a good thing, we believe in it, as we stated in the preamble of one of these exhibits that we have just been talking about in that bunch, why, obviously, we would put out—we would send one to the trade similar to it.

Q. That is what I wanted to bring out.

A. In one case we made an exact copy of the other fellow's policy.

Q. When you put out a policy, you mean by that that you send it to whom?

35096 A. Yes, when I say we put out a policy, I mean we send a notice to the trade.

Q. What do you mean by the trade?

A. Mostly dealers.

Q. The dealers that you have on your list as customers?

A. As customers and prospective customers.

Q. Or prospective customers.

I would like to talk with you a moment, Mr. Stone, about your sales to railroads. Your company makes sales to railroads, does it not?

A. To the extent that we can.

Q. State just as briefly as you can how you make your sales to railroads, and give your reasons why those sales are made in that way, if those sales differ from other types of sales?

A. They do differ in some respects. Generally the railroads are quoted f. o. b. cars delivered at or on—I am not sure whether it is at or on their rails. Now, the point at which that delivery is made on their rails may be a junction point, if our quoting mill is not located on the rails, or it will be at the point on the rails where our mill is located, if it is located there.

Q. In other words, that is a difference from your sales to ordinary customers or buyers in that it is not a sale at the point of use necessarily, where the railroad wants to or expects to use the cement? Is that the difference?

35097 A. Yes. At times we have quoted the railroads f. o. b. the destination that they specify where they want the cement.

Q. I am talking about what you generally do, though. There is that distinction generally in railroad sales?

A. Yes. And that distinction was what?

Q. That with respect to sales to railroads the sale is not f. o. b. the point of use.

A. Oh, no, no, no, that kind of sale I am just describing is not the point of use.

Q. Although, as you have indicated, you do at some times make some sales at the point of use when the railroads want quotation of that kind?

A. That is right.

Q. The latter is the exception, is it?

A. It is the exception, and we prefer not to have the exception. We would rather sell it the other way.

Q. Just give us your reasons for selling railroads the way you do.

A. Why, the railroads haul their own materials. Well, they speak of it as a free haul. They buy materials on their—delivered on their rails, and then they haul it for their own account to the points or point that they want to use it, and in the case of cement, it is usually points rather than point. They move it up and down their line, drop off a little here and a little off there, and use it for maintenance of way, and the cost to them is very small unless the haul to where they want it is a very long haul.

Q. Were you through with your answer?

A. On that point. I think I mentioned that we would rather sell railroads in that way, and we believe they would rather buy that way.

Q. Why would you rather sell them that way?

A. Than any other. Well, if we sell them f. o. b. destination—

Q. You meant by "destination" point of use?

A. Yes, or a destination that they designate, say, they want to build a railroad station in a town, deliver cement to that town. If we quote railroads on that basis, in some instances, at least, they will buy from the most distant mill; at least, from the mill that will provide—that will cause the longest haul on the rails of the buying road, so that the buying railroads, that is, the railroad buying the cement, will earn the freight charges on the haul of cement.

Q. What would that do to the mill net of the seller or the net return of the seller?

A. Well, take a seller with two mills located on a railroad, east and west. He would insist on shipment from the west being made to the eastern destination. Now, then, taking, not with two railroads on the line, but let's take the case like—take an extreme case like the Illinois Central, that runs from Chicago down to New Orleans. If the manufacturer in Chicago should quote a delivered price at New Orleans, if he should be willing to go down to the low so-called net that he would get on such a sale, why, the Illinois Central Railroad would buy from Chicago and haul the cement down to New Orleans, thereby earning the freight charges on the haul rather than to buy it from a mill that is located down there in New Orleans.

35099

Trial Examiner Norwood: Well, that would be bought on the basis of New Orleans delivered price?

The Witness: Yes, sir. If we in Chicago are willing to quote them f. o. b. delivered in New Orleans.

Trial Examiner Norwood: Yes.

The Witness: They would buy from us and have us haul it over their railroad, or they would haul it over their railroad for us and earn the freight charge.

By Mr. Hershberger:

Q. So that—

The Witness: Now, you can turn that around, and if the work were in Chicago—

Trial Examiner Norwood: Yes.

The Witness: —they would buy, if they could, from a mill located in New Orleans.

Trial Examiner Norwood: Yes. Don't you sell them f. o. b. your mill or f. o. b. their tracks at the nearest point?

35100

The Witness: Well, I just explained, Judge, that, or tried to, that generally our sales to a railroad are f. o. b. cars on their rails, delivered on their rails.

Trial Examiner Norwood: Yes.

The Witness: Now, that is the general method that we use or practice, that we use, but in some instances we have quoted them f. o. b. delivered at destination.

Trial Examiner Norwood: Yes. I see.

The Witness: But we prefer not to use that latter method.

By Mr. Hershberger:

Q. And, Mr. Stone, the statements that you have just been making regarding the example from Chicago to New Orleans, I understand was in response to my question as to why you did not prefer to sell f. o. b. destination to the railroads?

A. That is it, yes.

Q. In other words, you were illustrating what would happen if it was that way?

A. Yes, and I illustrated by a very extreme case. You might say almost a ridiculous case, because it is so far away, but if you shorten the distance, why, you still have the same relative condition.

Q. Of course, the method which you employ of selling railroads f. o. b. the nearest junction point is a matter of long use, is it not?

A. Of long use, yes; and I have heard it stated
35101 that we sell f. o. b. mill to a railroad. I consider that we sell railroads f. o. b. cars delivered on their rails, and that point may be at a junction point, or at a point where our mill was located, but not f. o. b. mill.

Q. Mr. Stone, will you state in as brief a summary as you can what your company does at the time of price advances with respect to how they are handled, and you might also then make a brief statement summarizing, as quickly as you can, what your company does with respect to price declines—first, advances and then declines.

A. I take it from one clause of your question there that this is what we do with respect to why we make the change?

Q. That is correct.

A. That is, the mechanics.

Q. Yes; the mechanics.

A. If we decide to make a change up or down, the way we do it?

Q. That is right. That is what I want to know.

A. We send out literally thousands of broadcast quotations to our dealers, quoting them the price f. o. b. their destinations.

Q. Does that notice indicate when the price advance will be come effective?

A. The notice usually bears a date, and states, in addition to that, another date on which the advance will
35102 be effective, and that interval between those two dates is usually five days.

Q. "Usually." Is there some variation?

A. Well, I say "usually," because at times when somebody else has put out a price advance—and there, again, I use the words "put out"—has announced a price advance to the trade, and we desire to advance our prices, we have made our advance effective on the same date that the competitor has announced, but, generally, we make it a flat five days from the time that we make our own announcement.

Q. Is there any particular reason why these price advances are not made immediately, but are always five days or some number of days off before they become effective?

A. I think, ever since I have been in the cement business, few, if any, companies have announced a price change overnight, and confined all their sales the next morning to the new price. It just was not done. In the ordinary company's business from day to day you cannot do that.

Q. Would the dealer commitments have any relation to that?

A. Yes. The dealer has posted quotations outstanding to his own trade. Also, here is a dealer on this side of the street who has his warehouse well stocked, and the dealer on the other side happens not to have ordered cement recently, or happens to have shipped out what he did have, and it seemed to us unfair that the dealer who was well stocked would have cement that he could sell at a relatively higher price than the dealer who had no stock
35103 and had to buy from his manufacturer at a higher price; and it simply seemed that it would be fairer to our customers to give them some notice of a price advance—of an advance in our price, in order that they might be able to clean up these odds and ends and get themselves protected against the hardships that they otherwise would suffer.

Q. Does this fact that the actual effect of a price advance is delayed from five days, or some number of days, have any relation to the time that you can cash in on a price advance, and by "cash in" I mean begin to show results of a higher price?

A. In any event, even in the method of a price advance that I have described as effective years ago, the actual effect was that the business was sold at the old low price. The only difference is—

Trial Examiner Norwood: Now, wait. That has been

gone into a great many times, and the same reasons and the same methods have been brought out.

Mr. Hershberger: All right: I will stop if Your Honor feels that that is sufficient.

Trial Examiner Norwood: And Counsel can adopt all of that evidence.

The Witness: I did not answer a certain part of your question.

By Mr. Hershberger:

35104 Q. Now, in answering about the price decline, try to summarize that briefly along the same lines.

A. I can make that very brief.

Q. All right.

A. If we are about to put our price down because we want to get even because somebody else has made a reduction, the moment we put it down we may say it is effective some time hence, but nobody will buy it from us in the meantime. They will wait until it becomes effective. That is obvious.

Q. Do you put out a notice when you make a price decline?

A. No; they are effective at once. It could not be otherwise.

Q. In other words, you do not write a letter or send out a notice or anything of that kind to your trade?

A. Oh, yes; we do send out a notice of a price decline, but it is effective immediately.

Q. Yes, I understand. I was trying to bring out whether you did, in fact, send out a statement of some kind that would indicate that there had been a decline. As I understand it now, you mean that the quotation does accomplish that purpose.

A. That is right.

Q. Can you state just briefly the reasons for making a price decline effective? Just give us that in a sentence or two, if you can.

A. The reason for making it effective immediately?

35105 Q. Yes.

A. I think I described that in a question or two back.

Trial Examiner Norwood: Yes.

A. (Continuing) That even if we wanted to make it effective at some future date, we could not do it.

By Mr. Hershberger:

Q. All right.

A. Nobody would buy it from us in the meantime.

Mr. Hershberger: Will you mark this, please.

(The document was marked for identification "Respondents' Exhibit 2487.")

By Mr. Hershberger:

Q. Showing you Respondents' Exhibit, for identification, 2487, have you seen that before?

A. Yes.

Q. What is it?

A. It is a tabulation of changes in so-called price bases at Universal-Atlas plants, 1920 to 1938.

Q. Was it prepared by you or under your direction?

A. Under my direction, yes, and rather close direction over a long period of years. We keep this information. It is simply a matter of having someone put it together on one sheet of paper, like this Exhibit 2487.

Q. Does that purport to show the price base that was in effect at each of your mills, and the changes from time 35106 to time, from 1920 down to September, 1938?

A. Yes; it shows the prices and the figures in effect on January 1, 1920, and then the subsequent changes.

Q. The column at the lefthand has reference to dates, has it not?

A. Yes.

Q. The first being "1-1-20," meaning January 1, 1920?

A. That is right.

Q. And the figures in the column to the righthand of the first column become effective on the date in the first column that is opposite the figures; do they not?

A. Except the very first line. The very first line shows what was in effect on that date.

Q. Yes.

A. All the others show effective dates of changes.

Q. So this statement is a complete statement of your base price or price bases during the period shown?

A. Yes.

Mr. Hershberger: I would like to offer that in evidence (handing document to Counsel for the Commission).

Mr. Wooden: May I ask a question on voir dire?

Trial Examiner Norwood: You may.

Examination on Voir Dire by Mr. Wooden.

Q. I just want to make it certain that the dates
35107 shown on this document are the dates that the changes actually went into effect, or are the dates in some instances where the changes were announced?

A. In every case it was directed that they be the dates on which the prices went into effect, with the exception of that top line.

Q. This was a cumulative record which was kept as you went along during the years, and not made up all at one time?

A. Oh, we kept records as we went along for the information of our sales force, telling our people what prices to quote. It was just a matter of putting into that form; that is, into the form of that exhibit.

(RESP. EX. 2487 was offered and received in evidence.)

By Mr. Hershberger:

Q. Referring to the exhibit last mentioned, the period of time with respect to the mill at Waco shows a blank down to some time in 1929. That is because the mill was not in existence prior to that time?

A. It was not in existence prior to that time.

35108 Q. Mr. Stone, I hand you a group of papers which have been marked as Respondents' Exhibits, for identification, Nos. 2488 to 2509-B, inclusive.

I will ask you to state what those documents are.

A. These are what we know in our sales department as numbered price memoranda.

Q. For what purpose are they used?

A. They are issued by the head of the sales department to heads of various divisions of the sales department advising the latter of price changes or—and also authorizing the latter to meet or to put those prices in effect that are covered in the memorandum.

Q. Would you tell us whether the various memoranda which you now hold in your hand are statements of price changes or statements of some of the price changes
35109 which appear on Respondents' Exhibit 2487?

A. Yes. Respondents' tabulation, 2487, part of it is simply a tabulation of the matter contained in the price memoranda, Exhibit 2488, et seq.

Q. Take, for example, Respondents' Exhibit 2488, for

identification, and state what item on Respondents' Exhibit 2487 is the item about which the price memo refers or to which it refers?

A. The memorandum is dated January 17, 1930, and refers to a price change effective on that same date, and on the Exhibit 2487 is a line opposite the date, January 17, 1930, which corresponds to the change in the price memorandum, Exhibit 2488.

Q. What is the change in that respect that is shown on 2487, on the tabulation?

A. On 2487, the line shows the date, January 17, 1930, our Duluth price base, so-called, advancing from $1.55 to $1.65.

Q. Indicating that on January 17, 1930, the price at Duluth was changed to become $1.65?

A. That the so-called price base at Duluth was changed from $1.55 to $1.65.

Q. Now, referring to Respondent's Exhibit 2488, being the price memorandum announcing that change, does it show the same figure, $1.65?

A. No, it shows an advance—it doesn't state what the price had been prior to the change.

Q. The price base?

A. Yes, what the price base was, but it shows an advance to $1.85 Steelton, which is another name for our Duluth mill.

Q. Steelton?

A. Yes.

Q. How do you reconcile that figure of $1.85 in Respondents' Exhibit, for identification, 2488, and the figure of $1.65 which appears on Respondents' Exhibit 2487?

A. In looking over this job, while it was being done, I noticed discrepancies of that kind, and had someone in our office put a note on the top of the price memorandum, Exhibit 2488, explaining that difference, and the difference is simply this: The long tabulation, Exhibit 2487, shows figures without package charge and after discounts.

Q. And your price memorandum—

A. The corresponding item in the price memorandum is shown as a figure not including the package charge but before deduction of a dealer discount of ten cents a barrel.

Q. Well, in that particular case was it 10 cents a barrel?

A. The deduction of dealer discount of 10 cents a barrel

has not been deducted, nor has the cash discount of 10 cents a barrel been deducted. In other words, the price on 2488—the price in 2488, or the figures in 2488 are shown as $1.85, and on the January 17, 1930, line, in Exhibit 2487 as $1.65, that difference of 20 cents being the dealer's
discount that was in effect then of 10 cents a barrel,
35111 and the so-called cash discount of 10 cents a barrel.

Q. In other words, the tabulation is made after deducting all discounts and the price memoranda had not deducted the discounts?

A. That is right. That is right.

Q. Now, is that statement true with respect to the other price memoranda that I have had marked, for identification?

A. It is true in every one in this series. As I said a while ago, I detected this difference and looked into it to see what the cause of it was; when I saw what the cause was, I directed a clerk in our office to put a note at the top of each one of the price memorandum exhibits so that that would be explained.

Q. And that note is written in pencil on the various—

A. On the top, I think, of each one of them.

Q. —various exhibits, for identification, Nos. 2488 to 2509 B, inclusive?

A. 2509, 2488 to 2509-A and B, inclusive.

Q. And with those notes explaining that discount—do the price memoranda in each case correspond with the figures shown on the tabulation?

A. Yes.

Q. If consideration is given to those?

A. Yes, the details are not always as I described
35112 in the case of this particular change on January 17, 1930, because at different dates different discounts or other features had to be reconciled between the batch of price memorandum exhibits and the items on the tabulation, Exhibit 2487, but whatever the differences were are explained in pencil notes at the top of the price memorandum exhibits, 2488 to 2509-A and B, inclusive.

Mr. Hershberger: Will you mark this, for identification, please?

(The document was marked for identification "Respondents' Exhibit 2510.")

By Mr. Hershberger:

Q. Showing you again the Respondents' Exhibits, for identification, 2488 to 2509 B, inclusive, I also show you Re-

spondents' Exhibit, for identification, 2510, and ask you to state whether you have price memoranda for all the price changes shown on the Respondents' Exhibit 2487, from January 17, 1930, to the last item shown on September 6, 1938, in your hand?

A. If this bunch of price memorandum exhibits is complete, it shows every item from the date you just mentioned to the end, except that this Exhibit 2510 gives a list of changes that are listed in 2487 that were not covered by price memorandums such as the Exhibits 2488 to 2509-B.

Q. Then the price memoranda which you have, 2488 to 2509-B, plus the statement on Respondents' Exhibit 2510, for identification, covers all of the items on the tabu-
35113 lation, 2487, from January 17, 1930, to the end of that tabulation; is that right?

A. That is right.

Mr. Hershberger: I would like to offer in evidence Exhibits 2488 to 2509-B and 2510.

Washington, D. C.,
March 20, 1940.

35119 FREDERICK L. STONE thereupon resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Hershberger.

Q. Mr. Stone, what is your system of numbering of price memoranda? Do you begin at 1, at each year?

A. Yes, there is a separate series for each year beginning with No. 1.

Q. And, as I understand your testimony yesterday, those price memoranda, together with the list of price changes shown on the tabulation as to which there were no price memorandum, covered all of the price changes shown on your tabulation, base price changes?

35120 A. That's right.

Q. Now, will you explain the absence of certain numbers in your price memoranda that has been mentioned by Mr. Wooden?

A. What you have just said explains it, but I can expand it a little. The long tabulation of changes, the number of which I don't have in my mind right now, shows changes

with respect to so-called base prices at the mills of our company only. Now, any price changes that might have been made by us because of changes in so-called price bases, that we had learned about in the field that relate to other mills than those of our company—in other words, if we made price changes following the price changes made by others, we would get out similar memoranda, but that would not relate to our own plants. That is the reason for the missing numbers.

Is that clear?

Q. I think so. And, for example, if a price memorandum relating to a change in price made by some competitor, would your price memorandum in that respect indicate to the salesman, or sales offices to whom it was sent, that you had picked up in the field information regarding a certain change of price, and that your salesmen in that field were authorized to meet destination prices?

A. That is right. The memorandum in the case that you have described would be substantially the same in form as those that have been presented here in evidence; but
35121 unless it was a change that was made in connection with the price, the so-called price base, at one of our own mills, it is not on that large tabulation.

Q. You mean by that—

A. To which—

Q. —Exhibit No. 2487?

A. If that is the correct number—to which exhibit just mentioned this particular price memoranda presented here referred.

Mr. Hershberger: Mr. Wooden, do you want to ask any questions further about that at this time? If you do—

Mr. Wooden: As I understand it, I think, Mr. Stone, the missing numbers of these price memoranda relate to changes at other mills' basing points which did not result in changes at your own? Is that the idea?

The Witness: Yes.

Mr. Wooden: Well, it seems to me that my request for those missing numbers is just as much in point, if not more so, in view of that statement, than before.

Mr. Hershberger: We will get it. I wanted to be sure if you wanted that in view of that.

Mr. Wooden: All right.

Mr. Hershberger: We will get that.

Trial Examiner Norwood: Well, then, the exhibits are

received subject to the understanding that Counsel asked as to the originals, and as to the missing copies.

35122 Mr. Hershberger (Interposing): With respect to each of those—

Trial Examiner Norwood: Wait a moment.

Mr. Hershberger: I am sorry.

Trial Examiner Norwood: That refers to Respondents' Exhibits 2488 to 2510, inclusive, does it not?

Mr. Hershberger: Yes.

Mr. Conaghan: Yes, that is correct.

Trial Examiner Norwood: They may be received.

(RESP. EXS. 2488, 2489, 2490-A, 2490-B, 2491-A, 2491-B, 2492-A, 2492-B, 2493, 2494, 2495, 2496, 2497-A, 2497-B, 2498, 2499-A, 2499-B, 2500-A, 2500-B, 2501, 2502-A, 2502-B, 2502-C, 2503-A, 2503-B, 2504-A, 2504-B, 2505, 2506-A, 2506-B, 2507, 2508-A, 2508-B, 2509-A, 2509-B, and 2510, were offered and received in evidence.)

By Mr. Hershberger:

Q. Now, Mr. Stone, with respect to each of those base price changes, and the memorandum to your organization announcing it, of course you have in your files the material referred to from which you determined that the price changes should be made; is that correct?

A. The basic material referred to in the price memorandum?

35123 Q. Yes.

A. We do have, yes.

Q. What does that material consist of, in a general way?

A. Why, it consists of quotations, themselves, issued by our competitors that we have picked up in the field, and it also consists of notes to the office from the salesmen stating that they have seen quotations; also notes stating that customers have told them that they have received quotations. Still others are lists prepared by the sales office concerned of the changes that they have been able to learn about in one of the ways that I have just mentioned.

Mr. Hershberger: I do not want to offer in evidence, unless the Commission wants it, or unless Mr. Wooden should desire it, that type of material, because I think there is a great deal of that kind of material in the record already; but for the purpose of the record I hand you a file of papers containing possibly some fifty or sixty, or more, papers—

By Mr. Hershberger:

Q. (Handing documents to witness) Will you indicate whether those are announcements from other companies announcing a price change, and material of the kind that you have just classified, all of which relate to the price change shown by your February 2, 1933, memorandum, entitled "Price Memorandum No. 2," which is one of the exhibits which has just been received in 35124 evidence?

A. Yes.

Q. And would you say that with respect to each of your price changes a similar group of material had been made, or had been accumulated, before the price change was announced?

A. Yes, this is a representative group of such material picked up in the field, which bears a connection to the price memorandum that is attached (indicating).

Mr. Hershberger: Off the record?

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Hershberger:

Q. Mr. Stone, will you state whether your company supplies its salesmen in the field with The Cement Institute freight rate books?

A. Yes, with some few exceptions.

Q. And you have been doing that only since when?

A. We began to use the Institute freight rate book late in 1936, and before we had completed supplying the books to our entire force that had occasion to use them, the time extended on probably to, oh, some time early in 1937 before we had completely supplied our people.

Q. Have you made any estimates as to whether it would cost you more to go back to the use of books developed by yourself, and kept by yourself, rather than the 35125 use of the Institute freight rate books?

A. Yes.

Q. What can you say in that regard?

A. It is difficult to estimate now down to a cent what the cost of such a thing as that is; but I would say, in general, that if we should cease to use the Institute freight rate books and provide those of our own, we would immediately have to have four clerks, and, of course, there is expense in

connection. In addition to their salaries, there is expense connection with the space occupied by them, the office furniture, and the stationery they use, and the time of the stenographers that they use, and all that sort of thing.

Q. Those would be four traffic clerks?

A. Yes.

Q. Is that correct?

A. Yes.

Q. In the traffic department?

A. Yes.

Q. Mr. Stone, on pages 12245 to 12247 (referring to the official record), and again on pages 12260 to 12261, the Witness McKeag, whom I believe was a Federal Trade Commission attorney-examiner, testified that Mr. Hearn of the Superior Company had shown him some books, freight rate books, which had been prepared by Universal, and that Hearn had said he had accepted Universal's 35126 offer to supply such books to one-plant companies on an annual basis.

I would like to have you state whether the Universal-Atlas, or the Universal Portland Cement Company, did at any time supply freight rate books—that is, prepared by it to one-plant companies on an annual basis, or to any other companies on an annual basis, or on any other basis?

A. We didn't have such a plan or policy or practice.

Q. Have you made an investigation with respect to the testimony of Mr. Hearn, from your organization?

A. I have.

Q. Will you please explain what you found in connection with that?

A. I am told that years ago someone in the Superior Cement Company asked someone in our traffic department if we would let them have a freight rate book for the State of Ohio. We, not treating those books as secret information, simply compilations of public freight rates, simply gave a copy as a courtesy to the man who made the request.

Q. But, as you say, there has never been any program of making a practice of supplying companies with such books?

A. Certainly not.

Q. I would like to talk with you for a moment, Mr. Stone, about water shipments. Does the Universal-Atlas Cement Company make shipments of some of its products by water?

35127 A. At times we have; except from one plant the shipments have been comparatively infrequent.

Q. Where do you make your water shipments? From what plants?

A. We ship by water as a regular thing, or practically a regular thing, from the Hudson plant, and we have made shipments from time to time from Hannibal, and from Pittsburgh, and, in recent years, we have been shipping by water from our Buffington plant to distributing stations owned or leased by ourselves.

Q. In other words—

A. On the Great Lakes.

Q. Yes. You are making a distinction between your shipments from Buffington, and from the other plants mentioned, in that the shipments from Buffington are to your own facilities at other locations; whereas, the shipments from the other mills, Hudson, Hannibal, and Pittsburgh, to the extent that there may have been shipments made, have been to buyers; is that the idea?

A. That is generally true, although there is an exception here and there to that, and where we make shipments from one of those mills to ourselves.

Q. Yes. Well, now—

A. But, in general, what you say is true.

Q. When you make water shipments, do you do that because the transportation rate is lower than the rate would be by rail?

A. I have known it to be both ways; sometimes

35128 higher, sometimes lower. I would say that that is not the prime reason for shipping by water, except from Hudson.

Q. Now, when you ship to a buyer by water, is the sale made on a destination basis?

A. There may, in years gone by, have been exceptions here and there, but, in general, that is true.

Q. Generally speaking, you charge at the destination the same as you would—

A. Yes, we sell on f.o.b. destination on delivery by water.

Q. And how is the price made? Is it different from the price had the shipment been made by rail, or is it the same?

A. Usually the same as if the shipment had been made by rail.

Q. Now, why do you make the price the same?

A. If it is a shipment to a place where a member of the industry, not we, ourselves, make the delivered price, we figure that, whether rightly or wrongly, but it is our idea that if we reduce the price at destination on the water shipment, rail shippers to that same point will simply reduce their prices to meet the prices we have made. Then we would be in a position we were when we started. Then if you want to carry it on, on the next water shipment, we would reduce the price further; rail shippers would meet that price, and you would simply have a downward spiral.

Q. Well, if, in the first instance, your transportation charges from your mill to the customer's destination by water are lower than the transporfation charges would be by rail from the same mill to the same destination—

35129

A. That is from our mill?

Q. That is right.

A. Yes.

Q. —you would on that particular sale have an advantage over your competitors if you made a lower destination price. And do I understand what you say to mean that you feared you could not retain that advantage as against other competitors?

A. That certainly is the case. When this word "advantage" is used in the cement business, I think it is a misnomer

Q. Well, that is a—

A. You cannot get an advantage of that kind and retain it.

Q. With respect to water shipments, of course there are certain limitations as to time when water shipments can be made; limitations as to the size of the load, and all that sort of thing that affect costs, are there not?

Mr. Wooden: Who is testifying now?

Mr. Hershberger: I wanted to summarize that in one sentence, because I did not want to go into it in detail; some other people have testified at length on it.

The Witness: Shall I answer?

By Mr. Hershberger:

Q. Do you have anything further to say about that phase of it?

35130

A. Yes. Where a mill is not equipped for making shipments regularly by water, certainly it is a nuisance to try to handle it. Where it is so equipped, it usually

has been quite expensive to equip it in that way, and if you take everything into consideration the mere fact that you may be able to hire a water movement for less money than you can hire a rail movement from the same place, that is not the entire story as to the expense of getting your goods delivered by water.

Q. In other words, you think there are other factors that enter into that?

A. Yes.

Q. Could you tell us, briefly, or do you know what the difference would be in barrels between an average carload shipment and an average water shipment?

A. Well, it is quite obvious that on the water shipment it would be very, very expensive to move a quantity as small as a carload, say, 132 barrels. Now, usually—and it varies, perhaps, at different times and in different locations—a minimum load for water shipments may be considered to be a different quantity, when it is a thousand barrels, fifteen hundred barrels, two thousand barrels, something like that,—but you have got to have a rather sizable quantity on a single water shipment to—

Q. You stated that—

A. (Continuing)—keep it—

35131 Q. Pardon me.

A. (Continuing)—from being absolutely prohibitive to move it that way.

Q. You stated a moment ago that your price was on the same basis as the rail shipment; what would be the point at which you would make your price on a water shipment?

A. Of course, where the water delivery can be made at the point where the cement is to be used,—that is, a delivery point; sometimes that is the point to which the railroad would deliver, sometimes it is not; when it is not it is at least near to the railroad delivery point,—and the price that we quote is the price that we would quote at f. o. b. railroad delivery point.

Q. The water shipments that you make from Buffington are in large quantities, are they not?

A. Yes.

Q. And is that in bulk, or in package, or is it both?

A. We have shipped in package, but our shipments now, I think, are exclusively in bulk, and exclusively to stations owned by ourselves and not directly to customers.

Q. What would be those stations, or some of them?

A. Milwaukee, Green Bay, Muskegon.

Q. All stations are on the Great Lakes?

A. Yes.

Q. Now, Mr. Stone, the subject of trucking is a
35132 matter that I would like to discuss with you: Will you explain whether your company has a general policy with regard to trucking of cement, indicating, first, whether there are any distinctions between the kind of trucking, that is, as done by yourselves, or as done by customers—by buyers—and what that policy is, if there is one?

A. We have no general policy, as is shown by the fact that we treat the subject differently at different places.

Trial Examiner Norwood: A little louder, please.

A. At different mills we do different things.

By Mr. Hershberger:

Q. When you mention trucking, you do differentiate between kinds of trucking?

A. Yes, as trucking has been practiced in the cement business it is usually one of two kinds.

Q. State what those are.

A. That is, the customer calls with trucks provided by himself, calls at the mill with trucks provided by himself, and they are loaded there; and the other method is for the owner of the mill to provide the truck equipment, load it himself, and deliver it at destination himself.

Q. Either owned or rented, perhaps, trucks?

A. Oh, yes, sure; you can either own them or rent them, and they are controlled by himself.

Q. Do you know whether or not there are limita-
35133 tions on the size of truckloads in certain areas, by statute, or otherwise?

Mr. Wooden: Your Honor, that is objected to as immaterial and irrelevant.

Trial Examiner Norwood: I do not see—

Mr. Hershberger: We will go over this very briefly, Your Honor, and I just want to get a few preliminary questions so that we have the general background, and then we will go into the subject of particular locations.

Trial Examiner Norwood: Go ahead. The objection is overruled.

A. I happen to remember definitely that in Texas there is limitation, and I think it is seven tons to the truckload—that is something like 18 to 19 barrels.

By Mr. Hershberger:

Q. Wouldn't 7,000 pounds be—

A. Oh, I beg your pardon—7,000 pounds.

Q. —be more accurate than seven tons?

A. Yes.

Q. Well, now, you do not truck from all of your mills, do you, or permit trucking from all of your mills?

A. No.

Q. Stated in a general way, first, what are your objections? Why don't you permit trucking from all of your mills?

A. Oh, there are various reasons. I would say a very large underlying reason is that if we started or indulged in trucking to a large extent no doubt other com-
35134 panies in the business would take up the same practice. That has been our experience, that major moves made by one competitor in the business are followed by others. I think I can visualize such a situation, if various companies should take it up indiscriminately I think it would make it necessary for our company to—

Mr. Wooden (Interposing): Your Honor, this is objected to; it is conclusion, and speculation on the part of the witness as to what the future possibilities are.

Trial Examiner Norwood: I think that he may give his reasons for opposing trucking, if he has stated that he did oppose it.

Do you oppose a general trucking policy?

The Witness: A general trucking policy? Yes, sir.

Trial Examiner Norwood: Yes.

The Witness: As shown—

Trial Examiner Norwood: You may tell us why.

Go ahead.

The Witness: May I have the last few words of my answer, please?

Trial Examiner Norwood: Read it.

(Last part of answer read as follows:

"I think I can visualize such a situation, if various companies should take it up indiscriminately I think it would make it necessary for our company to—")

35135 Trial Examiner Norwood: Go ahead.

A. —to establish distributing stations, or warehouses, in large markets that could be reached easily by trucks from competitors' mills. That would be an enormous expense; in fact, we have already had a taste of it.

in that we have felt ourselves compelled to provide such stations at certain locations, which locations had been and are being supplied with cement by trucks from competitors' mills.

By Mr. Hershberger:

Q. Just name those stations at which you have been forced to put facilities because trucking of one kind or another had existed?

A. Well, we have facilities of one sort or another at Milwaukee, Muskegon, Green Bay, Oswego, Pittsburgh, Washington, D. C., Miami, Cleveland—well, that is eight of them.

Q. Do you remember what some of the investments amounted to in dollars in some of those plants that you were forced to put in because of trucking competition?

Mr. Wooden: Objected to, Your Honor, as irrelevant and immaterial.

Mr. Hershberger: It goes to the question of what—

Trial Examiner Norwood (Interposing): I think he may complete the information, as Counsel has promised it would not take so very long.

Let him tell it.

35136 A. Where we have built permanent structures the expense has been quite heavy. I think it sticks in my mind that Muskegon cost some ninety-five thousand dollars; Milwaukee and Pittsburgh cost in the neighborhood of two hundred thousand; Green Bay, I don't remember the figure, but quite substantial investments, and at some of the other places we have—we rent or lease warehouse space.

By Mr. Hershberger:

Q. Now, it is your testimony that trucking which had been in existence at those various locations where you have the warehouses was the reason that precipitated your building those facilities, is it?

A. I think it is perfectly obvious where a competitor is supplying cement to a given market on a basis that the customer wants, as compared with the carload delivery method, that we would have to use from the comparatively distant points, it is obvious, I say, that we have to equip ourselves so that we can meet competition as it exists.

Q. Well, now, if trucking were generally permitted, or were provided by some edict of law, and if customers gen-

orally resorted to it, to what extent would that require your company to duplicate facilities for warehousing and otherwise, over your territory?

A. I cannot imagine such an edict. If there were one, why, we would simply have to watch and see what our competitors did in the way of trucking cement to sub-
35137 stantial markets, and I mean by that such towns that are not awfully big, Indianapolis, or towns of that kind that are not usually accounted as great cities. We would have to get some sort of means in or near those markets for storing cement from which we could truck it, or let customers truck, in competition with those who had nearby means of providing such deliveries.

Q. And, in your opinion, would the erection of those facilities by your own company, and other companies, ultimately result in higher costs, or not, to the consumer?

Mr. Wooden: Your Honor, that is objected to as highly speculative.

Mr. Hershberger: It seems to me that the charges are that the method of selling here involves higher costs to the consumer. There has been a charge in the complaint that prices are kept high. I would like to demonstrate that some of these things which they—

Trial Examiner Norwood (interposing): Ultimately add to the cost of distribution, you mean?

Mr. Hershberger: That is correct.

Trial Examiner Norwood: Yes.

Mr. Hershberger: It seems to me that the duplication of facilities would almost obviously—

Trial Examiner Norwood: Well, it is obvious, but I suppose he may tell us.

35138 Mr. Wooden: He is not testifying to any facts, Your Honor.

Trial Examiner Norwood: He is giving this as his reasons.

Mr. Wooden: His opinion on a hypothetical state of facts looking into the future.

Trial Examiner Norwood: No, none of this testimony will be taken as establishing any of these facts as to what the costs actually are.

I shall overrule the objection. Go ahead.

The Witness: May I have the question again?

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

A. Of course—

Trial Examiner Norwood: I think that you amended that to "higher costs of distribution," did you not?

Mr. Hershberger: I am willing to make that amendment, yes, Your Honor.

Trial Examiner Norwood: You may answer the question from that angle.

A. Well, it is perfectly obvious that the cost of distribution would grow and multiply. I can expand that, but it seems to me that it is obvious.

Trial Examiner Norwood: I think that you have answered that. That is on the assumption that selling
35139 to trucks, customers' trucks, at your mill would necessarily involve the establishment of these outlying warehouses, and these extra costs, is it?

The Witness: I say that I think that would be the case. Of course, I meant to say that would be one of the means—

Trial Examiner Norwood: Yes.

The Witness: —that would be adopted. Perhaps they would think up other means, and we, ourselves, would think up other means that do not occur to me now.

By Mr. Hershberger:

Q. Well, now, Mr. Stone, you have stated that, duplication of warehousing facilities, as a major objection to trucking—

A. Yes.

Q. —from any of your mills.

A. Yes.

Q. Do you have other objections to trucking from any of your mills?

A. The most important objection is that dealers, in the main, do not like it.

Q. How do you know that?

A. Well, we have, in years gone by, we have received so many expressions of their feeling about trucking, that it is a question that almost answers itself. Now, there may be a dealer here and there who does not agree with—or does not take that same view—but, in general, I
35140 know that I am expressing the true state of affairs when I say that dealers oppose trucking, and, obviously, a buyer usually does not persist in doing something that the—I mean, a seller does not persist in doing something that the buyers of his product do not like.

Q. Have you made any comparison at any times as to trucking costs? Now, I am talking of the kind of trucking

where you would truck from your mill to customers' destinations, compared with rail delivery costs?

A. Yes, we have looked into that question. I haven't the figure—the figures—at my finger tips, but I know that we have looked into it, and I think I said a little earlier in my testimony—no, perhaps that was with regard to water shipments; I beg your pardon.

Q. Well, how does it come out, in a general way? Are trucking costs cheaper than rail costs?

35142 By Mr. Hershberger:

Q. Handing you Respondents' Exhibit, for identification, 2511, will you see if that refreshes your recollection any, in that respect?

Trial Examiner Norwood: Well, what? Did he make that paper? Does he know anything about it?

The Witness: You are asking me?

Trial Examiner Norwood: Yes.

The Witness: It was made under my direction, made in our office, and we were looking into the matter in connection with the trucking that we felt ourselves forced to do from our Buffington plant and several of our packing plants, or warehouses.

Trial Examiner Norwood: Now, this is going to the question of why you do not transport cement in your trucks; is that the idea?

Mr. Hershberger: The question here is whether we find that it is more expensive to transport cement in trucks, or in rail.

Trial Examiner Norwood: Well, how is that? How does that affirm or deny any one of the issues in this case?

Mr. Hershberger: Well, this subject of trucking,

35143 of course, is a big subject, and we know from what has been said here, of course, that the attorneys for the Commission take the position that trucking should be permitted. Now, we have got, to get the whole picture of what trucking involves. It just seems to me it is an element that ought to be considered by anyone that has given any study to this question, as to what experience the various companies have found with regard to this subject of trucking; is it more expensive or less expensive; and we would like to contribute our experience, what we have found in that respect.

Trial Examiner Norwood: But is it in issue in any way? When you consider that the charge is not selling in such a

way that customers may be permitted to use their own trucks, if they want to, or make a saving on it; this does not go into that,—what it costs him to have cement hauled by truck.

Mr. Hershberger: Well, if Your Honor does not think it is of any importance—

Trial Examiner Norwood: I really do not.

Mr. Hershberger: —I won't press it.

Trial Examiner Norwood: I think I will sustain—

Mr. Hershberger: It seems to me that it is one of the facts in the situation of trucking that would be interesting, and I wanted to paint the picture completely—but

35144 if Your Honor—

Trial Examiner Norwood: Well, I think it is a general subject that has been covered abundantly.

Mr. Hershberger: I think it has been testified to by many people, and I was endeavoring to make it short on these general phases; but I won't persist in this if you think it is not desirable.

Trial Examiner Norwood: I was willing for him to make the general statement there to explain his action—

Mr. Hershberger (Interposing): Would you permit—

Trial Examiner Norwood: —without going at length into the subject, purely on the grounds that it would not prejudice the Government's case for him to do so, in view of all the evidence that is in on that question. So he may answer that general question.

Mr. Wooden: Your Honor, I still think that the facts and figures in the exhibit that has been numbered should be put forward rather than the general conclusion of the witness.

Mr. Hershberger: Oh!

Trial Examiner Norwood: Well, Counsel may go ahead, then.

Mr. Hershberger: Your Honor, I am perfectly willing to do any way that you want.

Trial Examiner Norwood: Go ahead.

35145 By Mr. Hershberger:

Handing to the witness—

Trial Examiner Norwood (Interposing): Make it brief.

By Mr. Hershberger:

Q. Again handing to the witness the exhibit marked for identification—you may use that in refreshing your recol-

lection in answering the question that is pending, please, Mr. Stone.

Mr. Wooden: Let us have the document, instead of starting his present recollection.

By Mr. Hershberger:

Q. Well, state what the document is.

A. The document compares the transportation rates, truck versus rail (referring to Respondents' Exhibit, for identification, 2511).

Q. What kind of trucking is that talking about?

A. This was made in connection with trucking done by ourselves; that is, in trucks controlled by ourselves. It is divided to show the situation with respect to cement moving out of our Buffington plant; (2) out of our Muskegon packing warehouse; (3) out of our Milwaukee packing plant; and (4) out of our Green Bay packing warehouse, or package warehouse. It shows the number of cents per barrel by which the truck rate is lower or higher or tied, and the number of destinations, number of destination points in each of those three divisions that I just mentioned.

35146 Q. What, then, do you find from that examination? Going back to my original question, as to whether trucking is less expensive, or more expensive, than the rail costs?

Mr. Wooden: That is just what I objected to; Your Honor; the witness' testimony is obviously based on the document.

Mr. Hershberger: All right; we will offer it.

Mr. Wooden: Let us have the document rather than testimony based on it.

Mr. Hershberger: We will offer it.

Mr. MacIntyre: May I make a statement off the record, if Your Honor please?

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

What is the exhibit that is under discussion now?

Mr. Conaghan: Respondents' Exhibit, for identification, 2511, Your Honor.

Trial Examiner Norwood: Off the record.

(There was further discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wooden: May I ask a question on voir dire, Your Honor?

Trial Examiner Norwood: Yes.

35147 *Examination on Voir Dire by Mr. Wooden.*

Q. Mr. Stone, referring to Respondents' Exhibit 2511, for identification, that purports to show, does it not, that a comparison is made per barrel between truck and rail transportation?

A. This was made out in 1938, and I have not examined it recently, but I was in the discussion on it during the preparation, and the reason that I have to look at it is because of the lapse of time, in other words.

Q. Yes.

A. It shows the number of cents per barrel variation in the cost of moving cement from our Buffington plant, for instance, to the stated number of destinations to which the trucks moved, and the differences are shown in cents per barrel, lower, or cents per barrel higher, or tied.

Q. Yes.

A. As compared with rail.

Q. Now, further, this first column here is headed "Cents Per Barrel," and it runs from one up to thirty (indicating on exhibit).

A. Yes.

Q. Now, for instance, follow that column "Thirty Cents" across horizontally, you find there is a truck rate from Muskegon, one, one rate from Muskegon, and you follow it over further you find that that one rate, the truck rate, is lower than the rail; is that correct

35148 (indicating)?

A. Yes, in one instance.

Q. Yes.

A. Now, on the entire exhibit, 2511, the truck rate is shown to be lower from the stations from which the truck moves,—lower—

Q. By the amount?

A. Lower by 30 cents.

Q. Yes.

A. That would be the rail rate.

Q. Yes.

A. Than the actual rail rate.

Trial Examiner Norwood: Now, is that an analysis of long-distance truck rates, or within a zone of 40 miles?

The Witness: It is to considerable distances. We have shown it all the way from one cent, Your Honor, variations up to 30 cents, and there is only one at 30 cents; you see that is the unusual case.

Trial Examiner Norwood: You have shown the majority of them, then, are within a 40-mile radius from the mill?

The Witness: I don't remember the exact distance, but I would say the majority of them are within that.

Trial Examiner Norwood: Yes.

The Witness: Some extend beyond it.

Mr. Wooden: I might object on the ground that
35149 the underlying data is not here, because this simply shows the results; but I will not object because it shows, as a whole, just what we have all known, and has been shown hitherto, that it varies, but even here this shows a majority of the truck rates as being lower for the whole period than the rail, and that is particularly pronounced on the shorter distances, or on the lower number of cents per barrel.

Trial Examiner Norwood: Received as marked.

(RESP. EX. 2511, was offered and received in evidence.)

By Mr. Hershberger:

Q. Well, this exhibit shows that in some instances truck rates are lower, and in some instances they are higher than the rail rates; is that right (referring to Respondents' Exhibit 2511)?

A. That is right.

Q. So you cannot make any definite positive statement that trucking rates are lower or higher than rail transportation?

A. You cannot make such a definite statement.

Q. Now, referring to your separate mills,—take your mill at Waco, Texas: Do you or have you permitted trucking from your Waco mill?

35150 A. I am quite sure that there has been no trucking from Waco since we have owned the plant. Now there may be an exception here and there in the case of an emergency. Furthermore, I will state I know of no request received by us from the customer for the movement of cement by truck out of Waco.

Q. Referring to your mill at Hannibal, Mo., do you or have you permitted trucking from your Hannibal mill?

A. There was some little trucking from the Hannibal

mill when we first came into ownership of the plant. As I remember it, it was not large enough to attract our attention particularly. Now, I do recall that there was some talk among our own people in Kansas City or the St. Louis offices, about the shipment of some special products that were made from Hannibal, such as white cement, and I think mortar cement, perhaps Lumnite cement; but the quantity involved was so small that we said to our Kansas City and St. Louis offices, "Go ahead and do as you like, if you want to truck that little amount, by truck or rail, why, all right."

Q. How about grey standard cement?

A. We stopped the movement of grey cement out of Hannibal, oh, I would say as far back as '32, 3 or 4, in there somewhere.

Q. 1932, you mean?

A. Yes, 1932, 3 or 4.

Q. Was your Hannibal mill quite distant from [illegible] some of the large markets to which its products are sold?

A. Well, it is some hundred miles up the Mississippi River from St. Louis, which is the biggest town. It is right across the river from Quincy, Ill., but I think you can see that the markets are not very large, or close to the mills.

Q. Are there mills of competitors nearer St. Louis than your Hannibal mill?

A. Yes, there are mills of competitors in St. Louis.

Q. Referring to your Independence, Kansas, mill, do you or have you permitted trucking from that mill?

A. I can almost say that everything I have said—I have just said—about Hannibal applies to Independence; may be some little differences.

Q. You mean by that that there is no trucking of standard cement there at the present time?

A. No.

Q. And about when was it discontinued, if it was discontinued?

A. I would say within one of those three years that I have mentioned, along about the same time as Hannibal.

Q. 1932 or 3?

A. Yes.

Q. You stated a while ago, did you not, Mr. Stone, that you had a warehouse at Cleveland, Ohio?

A. Yes.

35152 Q. Do you or do you not have trucking from the Cleveland warehouse—from your Cleveland warehouse?

A. We control—that is, we provide these trucks ourselves, and deliver cement at the customers' destination, out of that warehouse.

Q. Don't you also permit customers to call in their own trucks, of they want to?

A. Oh; to some extent. They occasionally come there and get it, but as long as we deliver it for them, I think they prefer it in practically all cases.

Trial Examiner Norwood: Do they pay destination price?

The Witness: In Cleveland, yes.

By Mr. Hershberger:

Q. When did you first establish your warehouse in Cleveland, if you remember?

A. I would say the fall of either 1934 or 5.

Q. You would not think it is a year earlier than the first date you mentioned?

A. It is possible.

Q. Is Cleveland one of the places which you mentioned some few moments ago to the effect that your warehouse was put there because other companies were then trucking?

A. Yes.

35153 By Mr. Hershberger:

Q. Now, Mr. Stone, do you or have you permitted trucking from your Hudson mill?

A. When we came into ownership of the property, trucking was being done there in the form of movement out of the plant on customer-owned or provided trucks.

Q. That was in 1930 that you are talking about?

A. That was in 1930, yes, and it was discontinued at the Hudson mill, I would say, in—or some time in 1932 or 1933.

Q. Explain the trucking at Hudson. Was there any particular charge, any differential, or anything of that sort?

A. At the start under our ownership there was no so-called differential; but at one of the other plants acquired at that time, comparatively nearby—

Q. What one was that?

A. Northampton. There was a 15-cent differential, and

we established a similar so-called differential at Hudson, some time in 1939, I think.

Q. Well, now, you stated that trucking was discontinued there at your Hudson mill?

A. Yes.

Q. What were the reasons for that?

35154 A. It was discontinued about the same time that we discontinued at Northampton, and our discontinuance of it followed action of the same kind that had been shown by numerous notices put out or sent out to the trade by competitors in the eastern section of the country.

Q. You mean by that that other competitors had stopped trucking before you did?

A. I think so. In every instance some of them had; that is, meaning by that, with respect to Northampton and Hudson.

Q. Yes.

A. Some of them in the general locality had notified the trade that they were discontinuing trucking.

Q. Well, was that at a period when you were receiving any communications from dealers that you referred to a while ago about trucking? You spoke of receiving communications from someone.

A. Yes, there was an unmistakable attitude on the part of dealers, expressions of their dislike of trucking.

Q. Now, take your Duluth mill, Mr. Stone, and tell us whether you permit trucking from that mill.

A. Trucking is being done now from Duluth, yes.

Q. And on what basis?

A. The customers' trucks call at the mill; in other words, we do not make truck deliveries ourselves.

Mr. Wooden: Your Honor—

35155 Q. Do your competitors—

Trial Examiner Norwood: Wait a moment.

Mr. Hershberger: Excuse me.

Mr. Wooden: Your Honor, I move the striking of the testimony just given unless and until it be shown that this occurred prior to the issuance of the complaint.

Mr. Hershberger: When?

Mr. Wooden: Prior to the issuance of the complaint.

Trial Examiner Norwood: When was this?

The Witness: The trucking from Duluth?

Trial Examiner Norwood: Yes.

The Witness: It has been—I cannot say just when it

started, but it certainly was in vogue prior to—when was the complaint filed?

Trial Examiner Norwood: July, 1937.

The Witness: Oh, it was in vogue there before then.

Trial Examiner Norwood: That is, on an f.o.b. mill sale or on a delivered-price basis?

The Witness: F.o.b. customers' trucks at mill.

By Mr. Hershberger:

Q. As a matter of fact, that has been in effect in Duluth for a good many years?

A. For a long time. I don't remember at all.

Trial Examiner Norwood: Go ahead.

A. But I do know it was in effect before July, 1937.

35156 Q. Is there a differential charge there in connection with trucking?

A. No.

Q. What is the price?

A. The same as our so-called price base at the Duluth mill; our Duluth mill.

Q. Yes.

Do you find that there is a competitive situation in Duluth that other competitors are trucking or permitting trucking?

A. Yes, there is another company that has a packing plant, or whatever it may be called, in Duluth, from which there is trucking, and I believe on the basis of delivery to customers' trucks at that plant.

Q. Do you know what the price basis of the other competitors' trucking is?

A. We were able to sell our cement in Duluth on the basis I have just described, and I have never known why we didn't have more difficulty in selling it than we do because the packing plant of the competitor located there is nearer to the heart of town than is our mill, and I read in the record here recently that that competitor is charging customers 4 cents a barrel above the so-called price base at his—at that Duluth plant of our competitor; from which freight rates are substantially the same as from our Duluth mill.

35157 Q. Had you known that prior to reading the record?

A. It was a complete surprise to me, but it furnishes an explanation to me, at least, of why we, located farther away from the town, have not had complaints from our customers there, because it obviously cost them more to haul cement

from our Duluth plant into Duluth than it does from the plant of our—the packing plant of our competitor there.

Is that clear?

Q. It is clear to me.

A. It was a complete surprise to me, and I speak now from memory of the record.

Q. Now, refer to your Milwaukee packing plant, Mr. Stone, and tell us whether trucking is permitted from that plant, and, if so, describe the beginning of trucking, and the price, and so forth—the various elements that we have been talking about in regard to these other locations.

A. Substantially all of the cement that moves by truck out of the Milwaukee plant is in trucks provided by ourselves, and we sell it to the customer f.o.b. his destination. I believe there is a movement from time to time in a truck owned by the customer, but such movement is negligible, I think.

Q. But you do permit a customer to call with his own truck, if he wants to do so.

A. Yes.

Q. Now, how long has that trucking been per-
35158 mitted from your Milwaukee packing plant?

A. Since the plant opened.

Q. Do you recall about when that was?

A. That was in the latter part of 1930, I think.

Q. What were the circumstances that existed that impelled your company to erect the packing plant in Milwaukee?

A. There was no cement manufacturing plant in Milwaukee, but several packing plants were built by competitors in Milwaukee, and we simply, to—

Q. You mean prior to the time you—

A. Well, I was going to say we simply had to build there in order to be competitive with the competitors who were already located there.

Q. Were these competitors that had located there previous to the building of your packing plant trucking, or not?

A. I think they were. I am quite sure they were all trucking. Whether they began it immediately upon the opening of their plants, I cannot recall, but I know that they soon began it, and I am quite sure that they began it before the opening of our plant.

Q. Had that had any result on the volume of your shipments that had been going in by carload?

A. Oh, yes, our shipments had dwindled seriously.

Q. Prior to the putting in of your plant?

A. Prior to the building of our plant. We built it
35159 there to try to maintain our position in Milwaukee, where we had marketed cement for many years.

Q. Is Milwaukee a price base or a basing point?

A. It is, so-called.

Q. In other words, cement moving out of Milwaukee is based on the price at Milwaukee, rather than at the mill where the cement is manufactured?

A. Yes; that is as has been described in this case; yes.

Q. Was that price base, or the making of Milwaukee a basing point, done by you, or was it done by some competitor; do you recall?

A. By a competitor. We found quotations from a competitor at destination points, deducting the freight from any mills that might supply that general locality, and we found that that figured back to a constant figure at Milwaukee.

Q. I hand you some papers to refresh your recollection. I do not care to have them offered into evidence, unless Mr. Wooden requests it, but I will ask you to state whether those several papers that I have handed you are quotations picked up in the field and notices from your salesmen, indicating that a competitor had established a price base at Milwaukee?

A. Yes. Two of these are actual quotations. Two of them are notes from one of our sales people, saying that they had learned that such quotations had been sent out by the Huron Company.

Q. This top letter that I hand you is not one of
35160 the papers that I have described, is it?

A. The top paper is a memorandum dated May 23, 1931, from my office to one of our sales people, authorizing him to meet the prices issued by Huron.

35161 (RESP. EXS. 2512, 2513, and 2514, were offered and received in evidence.)

By Mr. Hershberger:

Q. I show you Respondents' Exhibit, for identification, No. 2515, and ask you to state what that is, please.

A. It is a tissue copy of a letter, dated March 19, 1935, to the chairman of the Code Authority, written in my office.

Q. And is that in substance a filing by your company of a trucking arrangement from the Milwaukee plant, a filing with the Code authority?

A. Yes. It is a filing that we made meeting a prior filing by some other unnamed company.

Q. And does that statement, in substance, indicate the method in which trucking is permitted at this time from the Milwaukee plant?

A. I remember this in a general way—I have not read the letter in full, but I imagine that is the case.

Q. Take the time to read it.

A. The whole thing?

Q. If you think there might be any substantial differences.

35162 A. I do not think there are. I was simply mentioning that I had not read it.

Q. All right, read it.

A. Yes; this merely copies the code filing, apparently, filed by a competitor, which we were meeting.

Q. Does that substantially represent your trucking practice at the present time?

A. Yes.

Mr. Hershberger: I offer that for the record (handing the document to Counsel for the Commission).

Mr. Wooden: May I ask just one question on voir dire?

Trial Examiner Norwood: Certainly.

Examination on Voir Dire by Mr. Wooden.

Q. Can you say whose filing it was that you met with this document?

A. I think I mentioned that it was an unnamed company.

Q. Can you name the company?

A. I cannot be sure of it.

Q. Well, was it one of a very limited number?

A. Oh, yes.

Q. One of which possible ones?

A. It would be Medusa owning the Manitowoc, Wis., plant, or the Petoskey Company, or the Huron Company, or, if they had warehouses in Milwaukee at that

35163 time, the Alpha Company or the Lehigh Company.

Trial Examiner Norwood: Do you mean that that is a statement of policy with regard to trucking that was not signed or identified in any way as the policy of a particular company?

The Witness: I think I can make it clear in this way, Your Honor: We wrote to the Code Authority and said

"We acknowledge receipt of your notice to us that the filing has been made by an unnamed competitor." We wrote back, saying "We quote below the filing of the unnamed competitor and we, ourselves, file the same thing."

Trial Examiner Norwood: I was under the impression that this was picked up.

The Witness: This was during the Code.

Trial Examiner Norwood: I see.

The Witness: Wait a minute. What was the date of it?

Mr. Wooden: March 19, 1935

The Witness: You see, that was during the Code.

Trial Examiner Norwood: Yes.

By Mr. Wooden:

Q. Might the filing that you met have been possibly made by the Aetna Company, in addition to those that you have named?

A. I am not sure whether the Aetna was deliver-
35164 ing in Milwaukee at that time from a warehouse, but if they were I would add their name.

(RESP. EX. 2515-A and 2515-B, was offered and received in evidence.)

By Mr. Hershberger:

Q. As to these various competitors that you have named, you mean to indicate that any one of them might have filed it?

A. I have mentioned the names of all competitors that I think might have been in reasonable geographical position to deliver cement or permit some cement to be delivered in Milwaukee from some mill or station belonging to them.

Q. Now, your meeting of the filing was not, or was it—did you have any understanding or arrangement with these competitors that had made the prior filing, or the one that had, that you would do the same thing?

Mr. Wooden: I object.

Trial Examiner Norwood: The objection is overruled.

A. No.

By Mr. Hershberger:

Q. Why did you do it?

A. Why, we did it because here was a competitor who stated the basis on which he would sell cement in
35165 Milwaukee, and it presumably—I do not remember all the details—was a better proposition than we

had in Milwaukee, and we met it in order to be on a par with him in offering cement for sale to customers. In other words, that is the fundamental reason behind our building facilities in Milwaukee. We built them for that express purpose, of being able to compete with our competitors who were located there.

Q. And, of course, during the N.R.A. Code you had to make a filing before you could sell anything; is that true?

A. Yes.

Q. Now, referring to your warehouse at Green Bay, state when that was opened, and whether you have trucking there, and what kind of trucking it is, and so forth, as you have been speaking of with respect to these other places.

A. At Green Bay one or more of our competitors had some movement by rail, and we, years ago, acquired some property in Green Bay, with the intention of erecting some sort of a distributing station. We did not do that promptly, but we opened a warehouse there.

Q. Do you remember about when that was?

A. That, I think, would be about—oh, as far back as 1932, the opening of the warehouse, which was later succeeded by a station that we built there comparatively recently.

Q. How about trucking, do you have trucking from there?

A. Yes. The trucking from there is substantially 35166 on the same basis as from Milwaukee.

Q. Do you mean by that that you truck in trucks that you control to the customers' various destinations?

A. Yes.

Q. And do you also mean that the customer, if he wants to, can come in his own truck?

A. Yes; but I think that that latter is much in the minority.

Q. Do you know whether Green Bay is a basing point?

A. It is.

Q. Do you know about when it became such?

A. I don't remember the date; no.

Q. Was it many, many years ago, or—

A. No, no.

Q. —or quite recently?

A. It is fairly recently; within the last year or two, or two or three, or something like that.

Mr. Hershberger: Will you mark this for identification, please.

(The document was marked for identification "Respondents' Exhibit 2516.")

By Mr. Hershberger:

Q. Showing you Respondents' Exhibit, for identification, No. 2516, will you please state what that is?

A. This is price memorandum No. 16, dated August 29, 1938, apparently the original copy sent to one of our
35167 sales people, whose name is checked at the top among those to whom it was addressed.

Q. And does it have to do with establishing the price base at Green Bay?

A. Yes.

Q. Does that indicate to you the time, or about the time, that the price base was established that I asked you about a while ago?

A. Yes; it does. I said it was fairly recently. It was August 29, 1938.

Q. Does it indicate whether your company established a price base, or whether some other company had done so?

A. It was established by another company.

Q. Does that indicate whether you were instructing your sales people to meet the price base established?

A. Yes; it states so distinctly.

35169 Q. Mr. Stone, with respect to the Green Bay warehouse, would you say that the use of a price base at Green Bay for the purpose of determining the price of sales of cement moving from your warehouse was made by you following the picking up by your company of information to the effect that some competitor had so established a price base at Green Bay?

A. Yes. As in all of those cases, we simply found quotations in the field, deducting freight rates from them, and they were worked back to a constant figure as being there or anywhere else. We would assume that those were the prices that would apply in the territory around about.

Mr. Hershberger: I think that is substantially what I intended to prove.

Trial Examiner Norwood: Go ahead.

Mr. Hershberger: Will you mark this for identification, please.

(The document was marked for identification "Respondents' Exhibit 2517-A and 2517-B.")

By Mr. Hershberger:

Q. Showing you Respondents' Exhibit, for identification, 2517-A and B, will you look at that and state
35170 what it is, please.

A. This is a typewritten tissue copy, dated March 25, 1935, of a letter to the chairman of the Code Authority from our office.

Q. You have only looked at the first sheet of it, I believe.

A. Do you want me to go into the contents?

Q. No, I want you to tell what it is, without giving the contents.

A. And attached to that letter is a sheet dated March 25, 1935, relating to truck deliveries from our Green Bay, Wis., warehouse.

Q. Would you say that that is a truck filing establishing your trucking practice at Green Bay?

A. Yes. The letter, Exhibit 2517-A, so states.

Q. Was your company the first to truck or to permit trucking from Green Bay, or the territory surrounding Green Bay?

A. The first to permit it?

Q. Yes.

A. No; I think trucking had been done there before we began it.

Q. Did that particular filing with the Code Authority meet some previous filing that had been made by a competitor, or was it an original filing by you that did not follow some other competitor's filing?

A. Are you asking me for my memory or by reference?

35171 Q. I want you to tell us, if you knew.

A. My recollection is that we filed, ourselves, without reference to a filing made by anyone else. Now, of course, we knew what others were doing and had been doing there in general. We knew in a general way what they had been doing, but we filed with the Code Authority specifically what we wanted to file, and my recollection is, as I say, that we did that without reference to what someone else had done. I say that without reference to the exhibit.

Q. Well, you can look at the exhibit and see if there is anything in there that indicates that you are erroneous; or if it confirms your statement, you may say so.

Mr. MacIntyre: If Your Honor please, I would like to call your attention to the fact that we have spent the big part of this morning's session going over this testimony with this witness of his trucking policies. Practically none of it has related to the practice charged in the complaint. Practically all of it has gone to policies of trucking on a delivered-price basis, all of which is irrelevant and immaterial. I understood from you that you were permitting them, back an hour or so ago, to ask a question or two that would probably cover the thing without taking up a great deal of time, but we are continuing to take the entire morning on it.

Trial Examiner Norwood: I did not think that
35172 we should cut this short. There may be some small angle of this that has not been covered, so I am giving Counsel the benefit of the doubt as to whether it is advisable to come in. Most of it, I think, is irrelevant, but we are willing to—

Mr. Hershberger: I think, Your Honor, this testimony covers the same character and scope of the examination that was made by Counsel for the Commission on direct examination of his case, and I can assure you and Counsel that I will make our case just as short as I can, with due regard to what I think are the interests of my client, and I hope you will not stop me unless it gets to a point where you feel that I am abusing that privilege.

Trial Examiner Norwood: You are offering that now?

Mr. Hershberger: Yes, I offer that.

Trial Examiner Norwood: Is there any objection?

Mr. Wooden: I have not seen it.

(Mr. Hershberger handed a document to Mr. Wooden.)

Mr. Wooden: May I ask a question on voir dire?

Trial Examiner Norwood: Certainly.

Examination on Voir Dire by Mr. Wooden:

Q. Mr. Stone, whose are the initials "J. R. L." on Exhibit 2517-B?

A. It has been so long since I have been in touch
35173 with these people by name that I cannot be certain —J. B. Lair.

Q. "J. B." or "J. R."?

A. J. R. Lair.

Q. Who was he?

(RESP. EX. 2517-A and 2517-B was offered and received in evidence.)

Direct Examination (Continued) by Mr. Hershberger.

Q. Do you have a warehouse in Chicago?
A. Yes.
Q. What do you commonly call that?
A. Our Elston Avenue warehouse, which we have owned for many, many years.
Q. Do you permit trucking from that warehouse?
A. Yes.
Q. State briefly the basis on which trucking is done there, and the price.
A. We make no delivery from that warehouse in trucks controlled by ourselves. All cement that moves from that warehouse is hauled on dealers' trucks, which we
35174 load at the warehouse, and the price we charge is 5 cents a barrel higher than the price we charge customers f. o. b. cars at destination.
Q. In Chicago, you are talking about.
A. In Chicago; yes.
Q. Do you have competition in Chicago from competitors that also have warehouses there?
A. Yes. I can expand that, if you like.
Q. Well, if you think there is something else you want to say in connection with the general question I asked you, go ahead.
A. If that gives all the information necessary, there is no particular point to it.
Q. I think that is sufficient.
Now, discuss briefly your situation in Muskegon. Tell us about your warehouse there, when it was established, whether you do trucking there, and on what basis it is.
A. It is short. Our situation at Muskegon, again, can almost be explained from what I have stated as to Green Bay. All of the details do not fit in, but it is substantially the same situation.
Q. When did you establish your warehouse there?
A. We had what I might call a temporary warehouse arrangement there before, and it is only quite recently that we opened a structure for that purpose.
Q. Is Muskegon now a price base?
35175 A. Yes.
Q. Did you make it such, or did some competitor?
A. We did not. Some competitor did.
Q. Did you find quotations so indicating in the field?

A. Just as in the case of Green Bay.

Q. Did you then advise your people to meet those quotations?

A. We did.

Q. Do you know about the time that Muskegon became a basing point? Can you recall that?

A. I don't recall the date, no.

Q. I will hand you a document, and ask you if that refreshes your recollection, and then, if Mr. Wooden wants you to identify it, we will have a number placed on it. Does that refresh your recollection?

A. Yes; November 18, 1935.

(Mr. Hershberger handed the document to Mr. Wooden.)

Mr. Wooden: What was the witness' last answer?

(Answer read.)

Mr. Wooden: That is simply the date—

Mr. Hershberger: That is all. I handed it to him to refresh his recollection as to the date on which Muskegon had become a price base.

Mr. Wooden: By action of some competitor?

Mr. Hershberger: By action of some competitor.

35176 Mr. Wooden: You did not name the competitor?

Mr. Hershberger: No.

Mr. Wooden: If you will ask that, I will not ask anything about it.

By Mr. Hershberger:

Q. Do you know what competitor it was that established the price base at Muskegon?

A. I think it was Huron.

Q. Does that refresh your recollection as to whether it was or not (handing a document to the witness)?

A. Yes; it was.

Q. Do you have a warehouse or packing plant in the City of Washington, D. C.?

A. Yes.

Q. And do you deliver cement by trucks from that warehouse?

A. We do not deliver it, but the customers' trucks come there for it.

Q. And what is the price?

A. The price is the same as the f. o. b. car destination price in Washington and thereabouts.

Q. Had competitors located facilities of that kind in Washington, D. C., before your company did?

A. Oh, yes.

Q. And was it because of that you established facilities here?

35177 A. Yes.

Q. Now, referring to Oswego, N. Y., do you have a warehouse there?

A. Yes.

Q. State what the situation there is with regard to the establishing of that warehouse?

A. Several years ago the Huron Company had a boatload of cement go there, and I believe kept that port on the Lakes supplied by leaving boats there as a warehouse until they established a warehousing station or packing plant, and we saw our business dwindling in that territory because of the movement of Huron cement by truck from the boat or the warehouse, until we finally decided that we would put a warehouse in there ourselves.

Q. About when was that?

A. Oh, within the last couple of years.

Q. At Miami, do you have a warehouse or a facility of that nature?

A. Yes.

Q. And are the reasons that you have given in respect to why you put in one at Oswego about the same at Miami, and if there is any difference, say what it is.

A. Yes, there are some differences, but, in general, it is the same situation. The competitors put themselves in a position to have their cement delivered by truck,

35178 and we put ourselves in the same position, so we could meet what they were doing.

Q. Now, take your situation at Buffington and describe what you do with regard to trucking from Buffington.

A. What we do now?

Q. Yes; and give a history of it, if you will, as briefly as you can, giving the points that might be important.

A. Well, a brief history is that back in the late teens, or early '30's—

Q. Thirties?

A. Or, I should say, '20's—the late teens or early '20's there was a switchmen strike, which seriously interfered with the movement by rail. Also, subsequent to that time, in the early '20's, there was a very, very great car shortage, and it was with great difficulty that we were able to move cement out of any of our plants, and it affected Buffington. We resorted to all sorts and kinds of things.

We shipped cement in stock cars, with heavy paper lining; we shipped in open top cars, over which tarpaulins were put to protect the cement, and also by truck.

Trial Examiner Norwood: I do not think we need to go into all of these details.

The Witness: All right, but he asked me for a history of it.

By Mr. Hershberger:

35179 Q. That was the origin of trucking there?

A. That was the origin of trucking there.

Q. Did you do the trucking, or did the customers?

A. No; we never trucked from Buffington in trucks provided by ourselves, until comparatively recently, we began to do it into a county or two in the southern part of the State of Michigan.

Q. Generally speaking, all the trucking at that time was by customers calling in their trucks?

A. That is right, and it has continued so, with one exception that I mentioned. The cement does not move by truck out of Buffington into the State of Indiana.

Q. Why is that?

A. Largely and principally because the customers did not want it.

Q. Did it ever?

A. It did; yes. It moves into Illinois, which means really Chicago only. Maybe some of it has gone elsewhere, and it is loaded on customers' trucks, that they send to the mill, and our price is 15 cents higher than the so-called price basing point.

Q. Has that always been true during the period of time that you have indicated?

A. No; that has been comparatively recently. I mean by that, not prior to the beginning of the so-called depression.

35180 Q. At one time, then, the price was what at Buffington?

A. The price was the flat so-called price base at Buffington.

Q. And why did you put on the 15-cent differential which you have mentioned?

A. Well, there were a number of reasons. We had always considered, even in times of that inability to make deliveries by railroad, that because of the additional expense, the nuisance, and so forth, we ought to make some

sort of a charge. We did not do it at the time of car shortage and the switchmen's strike, because we thought that we ought not to, because it was not the customer's fault that we were not able to make deliveries; but, at any rate, we did not do it. As the depression came on, and the demand for cement dwindled, the competitors, hungry for business, came into Chicago, with offers to customers of prices lower than their previous prices. We found instances of that kind, and we thought they were doing it because they were unable to get in there in sufficient volume in these hard depression times against the trucking situation that related to our Buffington mill.

In carrying out our earlier thought that there should be a differential, we put a differential on, and when I say "differential," I think I described it a moment ago, so it is clear what it is. We put on a differential of 15 cents.

Q. Did you do that after consulting your competitors about it?

35181 A. No, no. We did this on own hook. As I say, it was the continuation of an original idea that we had, that we really ought to charge more.

Trial Examiner Norwood: You have told us about that.

By Mr. Hershberger:

Q. And that differential is still in effect?

A. That differential is in today; yes.

Q. Now, you spoke a moment ago, just briefly, about trucking in your own or controlled trucks into Michigan. Tell us what that is, briefly, so that we will have that fixed.

A. I know we have mentioned that we have a station at Muskegon, Mich. From that station cement is trucked to destinations in Michigan. We find we can do it a bit cheaper to a limited number of stations in the extreme southwestern tip of Michigan by trucking it from Buffington, rather than from Muskegon.

Q. How long have you been trucking into Michigan in the way that you have indicated? Can you tell us about when that started?

A. Oh, it started just a few years ago.

35182 Q. Would you say that that was before the filing of the complaint in this case, or since?

A. I think it was before the filing of the complaint.

Q. Do you know whether it was during the N. R. A. days, or not?

A. Oh, I think it was after N. R. A. days.

Q. After that had ceased?

A. After the N. R. A. had ceased.

Q. I ask you to look at that document and see whether that refreshes your recollection as to when trucking started from Buffington into Michigan?

A. It does. This was an acknowledgment of the 4th of June, 1934.

Mr. Hershberger: I will not offer that for the
35183 record unless Mr. Wooden asks for it. It was only for the purpose of indicating the date that I showed it to the witness (handing the document to Mr. Wooden).

Mr. Wooden: I think I would like to have you offer that, if you will.

Mr. Hershberger: All right. Will you mark this? Is it received, in view of that suggestion, Your Honor?

Trial Examiner Norwood: Is it marked?

Mr. Hershberger: No. 2518; yes.

Trial Examiner Norwood: It is received as marked.

(RESP. EX. 2518, was offered and received in evidence.)

By Mr. Hershberger:

Q. Showing you Respondents' Exhibit 2518, is that the document which refreshed your recollection a moment ago in your answer as to the time trucking began from Buffington into Lower Michigan?

A. Yes.

Q. Just state briefly what that document is.

A. This is an original copy on the letterhead of our company, dated June 4, 1934, being the announcement to the trade with respect to trucking from our Buffington plant into Michigan.

Q. That sets the inauguration of the trucking, does it not?

A. Yes.

Q. Now, Mr. Stone, turning finally to your Pitts-
35184 burgh plant, the location at Pittsburgh, will you state whether trucking is permitted from your Pittsburgh mill, your Universal mill, so-called, and, if so, when it began and what the conditions are that surround it?

A. There is no movement of cement by truck from our Universal plant near Pittsburgh now. In the 1920's there was some trucking, largely for the reasons already stated in connection with Buffington. That is, car shortage. There was not a great deal of trucking until the competitor

opened the cement plant, I believe, within the city limits of Pittsburgh; at any rate, much closer to the heart of the town than our mill at the station at Universal, which is some 16 miles out. In view of the trucking from that competitive plant, we established a trucking station nearer to the heart of Pittsburgh.

Q. In what year was that, if you recall?

A. That was either late 1930 or early 1931.

Q. Is that the plant that you referred to this morning as having required an investment of something over $200,000?

A. Around that figure; yes.

Q. All right. Then what did you do?

A. Well, that packing plant was located about equidistant from the center of the town, with the competitive mill referred to. In other words, we put ourselves in the position to have it moved by truck out of our packing plant on a competitive basis with the competitor's plant.

35185 Q. What was the competitor that you speak of?

A. The Green Bag—now known as the Green Bag Cement Company of Pennsylvania.

Q. What was the price that you made for your cement when that trucking was permitted?

A. Throughout the time that there was trucking in Pittsburgh, the price was f. o. b. dealers' trucks at the plant, and the figure was the same as the so-called mill price base.

Q. No differential added?

A. No.

Q. That answer that it was the price base indicates that it was not the same as the delivered price in Pittsburgh; is that what you mean to indicate?

A. Oh, no. I said it was the so-called mill price base.

Q. How long did that trucking continue?

A. I have already stated that it was throughout all that period; it was along in the middle '20's on, but the trucking from our packing plant continued until late in 1931.

Q. And what did you do at that time? Did you stop trucking?

A. We stopped trucking; yes. That is, we stopped loading dealers' trucks at the mill and at the packing plant. We had not at any time delivered in trucks provided by ourselves.

Q. And when you stopped permitting dealers to call in

their trucks, they were calling at the packing plant, were they, or were they sometimes calling at the mill, also?

35186 A. Well, some few called at the mill, but I should say most of them were at the packing plant.

Q. When you stopped permitting the trucks to call, did you stop it at both places?

A. Yes.

Q. At the mill and at the packing plant?

A. Yes.

Q. What was the reason that you stopped trucking late in 1931, as you have indicated?

A. For some considerable period we had been receiving a great many requests to stop, from dealers, and a great many complaints from dealers about trucking. We had considered stopping for reasons that I have already mentioned in the earlier testimony, but primarily, right at that time, our main reason, I would say, was because of the importunities of dealers.

Q. I show you Federal Trade Commission's Exhibit 1043-RR and 1043-SS, being a letter signed by the Pittsburgh Builders' Supply Club to Fred G. McKee, West Penn Cement Company, dated August 17, 1931, the first paragraph of which says, in substance, that after December 1, 1931, it is the purpose of the dealers' whose names are shown on the attached sheet, that being Exhibit 1043-SS, to purchase their cement requirements in carload shipments only. The letter then goes on to explain the reasons for the statement of the dealers, and the last

35187 paragraph asks whether the addressee of the letter would receive the cooperation of the—

Mr. Wooden: Your Honor, this is—

Trial Examiner Norwood: Let him finish his question.

Mr. Wooden: He is just describing a set of circumstances to the witness preparatory to asking him a question. I think that is improper. He should ask his question without reference to this exhibit.

Trial Examiner Norwood: Is this a paper that has anything to do with it?

Mr. Hershberger: It is already in evidence, and I was summarizing it briefly.

Trial Examiner Norwood: We have had to discontinue that sort of thing, because it is the same thing as carrying over suggestions to the witness.

Mr. Hershberger: Well, I will not go any further with it.

Trial Examiner Norwood: In other words, bring out a matter of fact.

Mr. Hershberger: All right.

Trial Examiner Norwood: Unless this is a paper that he had something to do with, or had received.

Mr. Hershberger: I am trying to ask him about that, you see.

Trial Examiner Norwood: Well, bring that out, 35188 and it may be a paper that he may refer to.

Mr. Hershberger: All right.

By Mr. Hershberger:

Q. Now, looking at the exhibit, will you tell us whether your company received a similar statement from the Pittsburgh Supply Club?

A. I received a letter similar, and I think exactly the same as this one.

Q. Have you looked for it?

A. That is Exhibit 1043-RR. Yes, I have made a search for the one that we received, and I have been unable to find it. It is dated August 17, 1931.

Q. How do you know, then, that you received one?

A. I remember the letter.

Q. You remember it specifically?

A. I remember specifically that we did receive it, and dealers were talking to me at one time, and I think one of those dealers—I have not looked at that list to refresh my recollection, but one at least told me that the dealers were very, very fearful at that time, when they saw this packing plant of ours opening, plus warehouses of other competitors being put into Pittsburgh, that if you got the town dotted with manufacturers' warehouses, sooner or later it meant that it was going to put the dealers out of business, and the cement would be sold directly to the consumers.

35189 Q. In other words, he recited that as one of the reasons why, as a dealer, he objected to the trucking?

A. Yes, that is right; and I think that was a pretty general fear among the larger dealers.

Trial Examiner Norwood: That was an objection to the warehouse, was it not?

The Witness: They knew, Your Honor, that the reason for the existence of the warehouse was the trucking, that trucking was the thing that caused the establishment of

the warehouse, which is somewhat along the line of my testimony this morning. One follows the other.

By Mr. Hershberger:

Q. Did you talk with your competitors in the Pittsburgh district about the advisability of continuing or discontinuing trucking along the lines suggested by the Pittsburgh Supply Club?

A. No.

Q. Have you made inquiry of your Pittsburgh office to see whether the manager of that office made any such inquiry?

A. I did.

Q. What can you say in that respect?

A. He told me he had not.

Q. What did you finally do about trucking in Pittsburgh?

A. We discontinued it, as I stated a moment ago, late in 1931, after we had seen notices sent to the trade 35190 by some competitors that they were discontinuing trucking.

Q. Had you seen a notice put out by the competitors or Green Bag, whose name you mentioned a while ago, before you discontinued trucking?

A. That is one of the ones that I saw. I happen to remember that one, and the Pittsburgh Plate Glass Company, and perhaps others. Those two I am quite sure of.

Mr. Hershberger: Mark that for identification, please.

(The document was marked for identification "Respondents' Exhibit 2519.")

By Mr. Hershberger:

Q. Showing you Respondents' Exhibit 2519, for identification, will you state what this is, if you know?

A. This is an original notice on our company letterhead, dated November 27, 1931, advising dealers in the Pittsburgh district that platforms at our mill and at our packing plant would be closed to all trucking effective December 1, 1931.

Q. There is a pencil notation, I believe, on the bottom of that sheet. Can you state what that indicates?

A. This is on the face of the Exhibit 2519 and is—

Q. Don't read it. Just state what it means.

A. It is a pencil note dated November 27, 1931, initialed by one of our people.

Q. Does that refer to the sending out of this document?

35191 A. It does.

Mr. Hershberger: I would like to offer that for the record (handing the said exhibit to Commission's Counsel).

Mr. Wooden: May I ask a question on voir dire?

Trial Examiner Norwood: Certainly.

Examination on Voir Dire by Mr. Wooden.

Q. Mr. Stone, whose pencil handwriting is that at the bottom of the sheet, 2519, for identification?

A. The initials are "F.A.B.," that being F. A. Brine, B-r-i-n-e, of our Pittsburgh office.

Q. And all that handwriting is his?

A. I am quite sure that it is.

Mr. Wooden: No objection.

Trial Examiner Norwood: Received as marked.

(RESP. EX. 2519, was offered and received in evidence.)

Direct Examination (Continued) by Mr. Hershberger.

Q. Did you state that that was the notice that you sent out discontinuing trucking?

A. Yes.

Q. That indicates that the trucking was to be discontinued as of December 1, 1939, does it not?

35192 A. 1931.

Q. 1931.

Showing you Federal Trade Commission Exhibit 1320, I call your attention to pages 8 and 9 of that exhibit, being some testimony of Frank E. Guy, of the Universal-Atlas Cement Company, and indicating on page 9 that in 1932 64.19 percent of the shipments delivered in Allegheny County were by truck and 35.81 percent by rail.

Mr. Wooden: Your Honor, this is—

Q. (Continuing.) And some other figures. I would like to have you explain how those percentages of trucking continued after the date of December 1, 1931, about which you had testified that you stopped trucking?

Trial Examiner Norwood: What is that paper that he is using there?

Mr. Hershberger: It is an exhibit that Mr. Wooden introduced into evidence regarding trucking at Pittsburgh.

Mr. Wooden: It is the same sort of thing that I objected to a few minutes ago.

Trial Examiner Norwood: Yes.

Mr. Wooden: Conveying to the witness what is in a—

Trial Examiner Norwood: We are not interested in exhibits in the case that are not such papers as he would be justified in refreshing his memory from. They must be something that he has had some connection with. In
35193 other words, the Counsel may ask him these questions and bring out matters of fact, and after you have brought them out you may state for the record that this refers to certain exhibits, but the witness has no business with them, and excerpts from them should not be read to the witness.

Mr. Hershberger: Well, all right. I will ask him a question I think will bring out the same thing. I thought that would be a short and unobjectionable way.

By Mr. Hershberger:

Q. Can you state whether all trucking was discontinued from your Pittsburgh mill or packing plant as of December 1, 1931, as was indicated in your notice?

A. May I take my own exhibit again, or shall I state without looking at it?

Q. State without looking at it.

A. Of course, I haven't seen that exhibit for a long time, but I am very sure that it states within itself that trucking will cease on December 1, 1931, except that, of course, old contracts previously booked for that kind of delivery will be satisfied.

Q. In other words, there was some trucking after December 1, 1931, on old contracts?

A. On old contracts that had been booked some time prior to the notice.

Mr. Hershberger: That is the only point I wanted
35194 to bring out in that connection, Your Honor.

Please mark this document, for identification.

(The document was marked for identification "Respondents' Exhibit 2520.")

By Mr. Hershberger:

Q. Showing you Respondents' Exhibit 2520, for identification, will you state what that is.

A. Exhibit 2520 is a typewritten list headed "New Cement Plants Built Since 1920."

Q. Who made it?

A. Dated March 12, 1940. It was made up in our office under my supervision, and as directed by me as to form, and I entered into a discussion about many of the details in its preparation.

Q. And it purports to show new cement plants built since the year 1920?

A. Yes.

Q. And giving the name of the company, and so forth?

A. Yes.

Q. Capacity of the mills?

A. Yes.

Q. The source of the information from which the tabulation was made?

A. Yes.

Mr. Hershberger: I offer that in evidence (hand-
35195 ing the document to Commission's Counsel).

Mr. Wooden: I would like to ask a question, please.

Trial Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. Mr. Stone, referring to the showing here for the building of Gulf Portland Cement Company plant in 1938, there was some other plants built that year, too, were there not, that are not shown on your paper?

A. Our effort was to keep a running record of new plants as they appeared. Now, in ordinary human frailties if we haven't got them all it was simply because we—

Q. You don't have the one on there that was built last year in California, do you?

A. Oh, the Permanente.

Q. Yes.

A. No, I was probably dumb in not thinking to ask that same question. Of course, in the preparation of that, it wasn't done in a moment or two, and it was done over a period of some time trying to get all this information up. Permanente was simply overlooked.

Mr. Hershberger: Let me ask this question:

Direct Examination by Mr. Hershberger (Continued).

Q. This doesn't include enlargements of the
35196 plants by existing companies, this list, does it?

A. No, I am quite sure not.

Q. Just the new plants? That Permanente plant was an entirely new plant, was it?

A. Brand new, yes.

Mr. Wooden: It is objected to as irrelevant and immaterial, and as not going to any issue or evidence put in by the Commission.

Trial Examiner Norwood: What is that?

Mr. Hershberger: The purpose of this, Your Honor, is to show that for a period of some considerable years back to 1920, in fact, that the industry has not been monopolistic; it has not kept other people from coming into the business. One of the charges in this case, and, of course, one of the fundamental charges is that it is monopolistic and controlled, and we hope to develop by showing that many new people have come into the business a basis for contradiction of any such inference.

Mr. Wooden: On the other hand, the complaint alleges that one of the results has been the creation of excess capacity, which would be represented by new mills coming in.

Mr. Hershberger: It doesn't say that in the complaint.

Mr. Wooden: It does.

35197 Trial Examiner Norwood: Well, in that case it wouldn't hurt you.

Mr. Wooden: I am not objecting because it hurts, not at all. I don't think it helps anybody.

Trial Examiner Norwood: I think it is valuable information. I think we might receive it.

Received as marked.

(RESP. EX. 2520 was offered and received in evidence.)

By Mr. Hershberger:

Q. Mr. Stone, during the period from—well, during the period that you have been in the cement business, have a good many cement plants or mills gone out of existence?

A. Oh, yes.

Q. Do you recall specific instances?

A. Yes. Well, I can give an example: The Bellevue, Mich., plant owned at the time of its disappearance by

the Alpha Cement Company, and had had previous owners. There had been a number of mills out in Kansas; in fact, I think I have a record of two or three of them that have disappeared.

Trial Examiner Norwood: You mean taken over 35198 or discontinued?

The Witness: Disappeared completely, physically disappeared.

Mr. Hershberger: Please mark that for identification.

The Witness: I could probably think of—there was one called the Omega over in Michigan. Well, it is difficult to list the names, but there are several of them that I can think of offhand.

(The document was marked for identification "Respondents' Exhibit 2521.")

By Mr. Hershberger:

Q. Showing you Respondents' Exhibit 2521, for identification, will you state whether that is a statement prepared by you of a list of abandoned or discontinued plants?

A. Yes, this is a typewritten copy of a running record kept in our office that we have kept for many years showing plants that have gone out of business, physically been dismantled, and we add their names to the list as we learn of the event.

Mr. Hershberger: I offer that as supplementary to the other study of new plants (handing the document to Commission's Counsel).

Mr. Wooden: The same objection as to the preceding exhibit, irrelevant and immaterial.

Trial Examiner Norwood: Received as marked. 35199 Objection overruled.

(RESP. EX. 2521 was offered and received in evidence.)

By Mr. Hershberger:

Q. Showing you Respondents' Exhibits, for identification, 2522 and 2523, state whether you dictated these statements, and what they are.

A. Yes, I dictated them, and they are a list of the types of cement manufactured by our company, first, on Exhibit 2522, in the year 1926, and the other, Exhibit 2523, shows a similar list of types manufactured by our company in the year 1939.

Mr. Hershberger: I offer these in evidence for the purpose of showing that there are a great many different types of cement now manufactured as compared with the year 1926 (handing the documents to Counsel for the Commission).

Mr. Wooden: Objected to as irrelevant and immaterial.

Mr. Hershberger: There is a charge in the complaint, Your Honor, to the effect that the Respondents have
35200 standardized their products, for the purpose of making uniform prices. My endeavor is to show by Respondents' Exhibit 2523 that a great many of the products—they are not numbered here, but it is something over a dozen products that are now manufactured.

Trial Examiner Norwood: Is it on account of the fact that it is also alleged that it is a standardized product?

Mr. Hershberger: It is alleged that standard cement is a standardized product.

Trial Examiner Norwood: Yes.

Mr. Hershberger: And I want to show, Your Honor, that we make a great many other products which sell at the same price, but which are not the same. In other words, that destroys the contention—at least, it seems to me that it argues against the contention that sandardization was brought in, and that resulted in a standard price. I want show that there are other things that are not standard selling at the same price. We have boiled that information down very much and put it in a tabulation. I think that is the short way to do it.

Trial Examiner Norwood: There is much that can be said on the subject, and I think that this bit of information will not be amiss.

Mr. Hershberger: All right.

Trial Examiner Norwood: They will be received
35201 as marked.

(RESP. EXS. 2522 and 2523 were offered and received in evidence.)

By Mr. Hershberger:

Q. Will you take Respondents' Exhibit 2523 and indicate which of those products sell at different than the standard price, leaving those that you do not mention as understood to be selling at the standard price?

A. At the same price as the standard Portland cement?

Q. That is right.

A. That is, at the same price as we sell standard Portland cement for?

Q. That is right.

Mr. MacIntyre: Off the record.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: All right. Go ahead.

A. The second item is high early strength Portland cement. We offer that to the trade at a higher price than we quote for standard Portland cement.

White Portland cement and the item that immediately follows: waterproofed white Portland cement, we quote higher than we quote the standard.

Lumnite cement—I can repeat what I have just said.

35202 By Mr. Hershberger:

Q. Do you mean by that you quote Lumnite cement higher than standard cement?

A. That is right.

Q. Are there any others that you quote higher?

A. The same for oil well cement, known as "Unaflo."

Trial Examiner Norwood: Are you going to develop the relative volume of those various products?

The Witness: I have indicated those that we offer for sale at a price different from the price we quote for standard. All the rest on the list we offer at the same price as quoted for standard by us.

By Mr. Hershberger:

Q. Now, are those various types of cement that are mentioned there on Exhibit 2523, which are sold at the same price as standard cement, subject to variations in the cost to produce?

A. Yes; there is some variation.

Q. Why do you sell them all at the same price as standard cement, then?

A. Because the customer will not pay us more.

Q. And are there—

A. May I illustrate? Here is a customer that uses our cement for some time, our standard. He says, "Here, I find that I can get a competitive brand, which has a little more of this, that, or the other in it, and which af-
35203 fects it in this, that, or the other way, but I am afraid I am going to have to switch," and we make

up for him that cement which he describes, so that he won't take his business away from us, and he won't pay us more for it than he says he can get it for elsewhere.

Mr. Hershberger: Will you mark these 11 documents for identification, please.

Trial Examiner Norwood: Let that small document, the first one, be given a separate number, and then all of the others can have the same number with the letters A, B, C, and so forth.

(The documents were marked for identification "Respondents' Exhibits 2524, 2525-A to 2525-T.")

By Mr. Hershberger:

Q. Mr. Stone, I show you Respondents' Exhibits, for identification, 2524 and 2525-A to T, inclusive, and ask you to state whether that is a set of forms that was used by your sales department at the time this suit was started?

A. Yes. Exhibits 2524 through to 2525-T, inclusive, all are forms used by our company, and I am quite sure were used prior to the date of the filing of the complaint.

Mr. Hershberger: Now, Your Honor, I would like to make an offer of these exhibits for the record, to show an entire series— Off the record.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

35204 Trial Examiner Norwood: What does the record show now, Mr. Reporter?

(The record was read.)

Trial Examiner Norwood: Will you complete that sentence,— all of which show an entire series of what?

Mr. Hershberger: Of sales forms in use by the Universal-Atlas Cement Company at the time this proceeding was instituted.

Trial Examiner Norwood: Are they any different than the ones that we have already received in evidence?

Mr. Hershberger: I have not made offers of any others, so far, Your Honor. There may be some of those that are duplicates. If there are, we can pick them out and strike them. I am not certain of that.

Mr. Wooden: Are these offered for the purpose of showing that the forms used by the Universal-Atlas Cement Company were different, in substance, from those used and issued by other companies?

Mr. Hershberger: No; I am not making the offer for

that purpose, but I am making the offer to show what they are.

Mr. Wooden: Well, I object to them as irrelevant and immaterial, unless they are offered for the purpose of showing that they are different from the forms used by other companies.

35205 Trial Examiner Norwood: It is a complete set, you say?

Mr. Hershberger: Yes; I understand that is a complete set.

Trial Examiner Norwood: We have received forms of other companies, and Respondents earlier in the case reserved the right to adopt evidence given or put in by other Respondents, and hereafter I think of these forms, cards, price-cards, and so forth, should be made the subject of a short stipulation. Inasmuch as Counsel have a complete set here, received through others, I think we should receive these at this time, with notice to other Counsel to take advantage of this evidence that is already in, and not offer any others, unless they find them to be different.

The objection is overruled. They are received as marked.

(RESP. EXS. 2524, 2525-A to 2525-T, were offered and received in evidence.)

Mr. Hershberger: I just want to say for the record that my reply to Mr. Wooden didn't mean to indicate that these are the same as other companies, because I don't know. I haven't made the comparison, and I don't know whether they are the same or different. I 35206 didn't want my statement to be an admission that they are the same, because I am not sure.

Q. Mr. Stone, do you recall that a witness J. P. Callahan testified in this case.

A. Yes, I do.

Q. On behalf of the Federal Trade Commission?

A. Yes.

Q. And that he had testified about his inability to get a shipment of cement from the Universal-Atlas Company?

Mr. Wooden: Now, Your Honor—

A. Yes.

Mr. Wooden: —we are going through the same procedure, it seems to me, that we have gone through once or twice before notwithsanding objections, and that is why

—why doesn't he bring out the facts here without bringing to the witness' attention this matter, and thereby leading him into the kind of testimony he expects him to give?

Trial Examiner Norwood: Read him the question.

(Record read.)

35207 Trial Examiner Norwood: That is that matter down in Georgia?

Mr. Hershberger: No, in New York.

The Witness: New Jersey.

Mr. Hershberger. New Jersey, I should say.

Trial Examiner Norwood: I think he hasn't shown him any exhibit on that. I think he may answer that.

Mr. Wooden: I don't see any difference between showing him an exhibit and referring—

Trial Examiner Norwood: Well, he is recalling a special instance here.

Mr. Hershberger: Your Honor, may I—

Trial Examiner Norwood: This is the Respondent that was alleged to have refused it?

Mr. Hershberger: That is right.

Trial Examiner Norwood: I think you may call the particulars to his attention.

Mr. Hershberger: Your Honor, I take the position that I would have the right to call for the record, and read the record to the witness, and ask him if the statements made by the witness were correct. Now, I thought I could short-cut it in a way that would be satisfactory by merely calling attention of Counsel to the incident.

Trial Examiner Norwood: Generally speaking, it is better practice to bring out the facts and then after

35208 he has stated facts, you may refer to his testimony in the record for my convenience, but I think that question is all right. I will overrule the objection.

By Mr. Hershberger:

Q. Do you remember, Mr. Stone, what the incident was, and, if so, state it.

A. As I recall it, Mr. Callahan said that he had telephoned to our office and tried to negotiate a deal for the purchase of cement for delivery at Nutley, N. J., and our office refused to make the sale or even to quote him for delivery at Nutley.

Q. Did you make an investigation in your company,

and from the records, to see whether Mr. Callahan's testimony was correct in that respect?

A. I did.

Q. And what did you find?

Mr. Woooden: Your Honor, I object, unless it be shown from what sources the information came to the witness, and the character of his information, and then it may be open to the objection that he is giving hearsay testimony.

Trial Examiner Norwood: I think you may lay the ground for this first.

By Mr. Hershberger:

Q. How did you make the investigation?

A. I inquired from those who handled that business in our company, which is the only source I have
35209 of getting information unless I physically do the work of the sales department myself, which I am not capable of doing, of course.

Mr. Wooden: Then, Your Honor, I object on the ground that the question calls for obviously hearsay testimony.

Trial Examiner Norwood: But he hasn't asked the question yet.

Mr. Hershberger: Your Honor, Mr. Stone is the vice-president in charge of a great many people up there, and when we are dealing with corporations we can't, I hope, be put to the burden of calling every clerk that checks an invoice to, see—in other words, Mr. Stone ought to be permitted to testify that he has examined this matter by questioning the proper people in his organization whether sale to Mr. Callahan had or had not been made to test whether Mr. Callahan was testifying to the truth.

Trial Examiner Norwood: I think you will have to bring direct evidence as to that sale.

Mr. Wooden: I think there is all the difference in the world between information that comes to a president in the ordinary course of his business as a part of the ordinary course of his business, and information that comes to him on special inquiry under such circumstance as this.

35210 Trial Examiner Norwood: I think so.

By Mr. Hershberger:

Q. Let me ask this question, Mr. Stone: Do you know whether or not in December, 1937, your company sold 1,000 barrels of cement to Mr. J. P. Callahan for delivery at Nutley, N. J.?

Trial Examiner Norwood: Now, answer that "yes" or "no."

A. Yes, we did.

Trial Examiner Norwood: As to whether you know.

By Mr. Hershberger:

Q. Do you know?

A. Yes, Your Honor, I know it.

Q. Did your company sell 1,000 barrels to Mr. Callahan?

A. Yes.

Q. For delivery at Nutley, N. J.?

A. Yes.

Q. And is that the time that Mr. Callahan was referring to in his testimony in which he said that you had not sold him 1,000 barrels?

Mr. Wooden: Your Honor, I object. That calls for a conclusion of the witness.

Mr. Hershberger: Why, it is a fact.

Mr. Wooden: Why don't we get some record data and some dates here, and so forth, instead of conclusions.

Trial Examiner Norwood: Objection sustained.

35211 By Mr. Hershberger:

Q. I show you Commission's Exhibit No. 1043-4-F, referring to the paragraph 3 of that letter, the first paragraph being merely a single sentence. Had you made any statements to the writer of that letter that would serve as a basis for the statement in that letter, or in paragraph 3 hereof?

A. May I read it?

Trial Examiner Norwood: Does that letter purport to quote him?

Mr. Hershberger: It purports to quote Universal.

Mr. Wooden: The witness is not Universal.

Mr. Hershberger: Well, he is as near as you can get to it when you have a corporation, I think.

Trial Examiner Norwood: Is the transaction familiar to him?

Mr. Hershberger: Let him just take a moment, if you will, please.

Mr. Wooden: I will look at it over his shoulder.

Mr. Hershberger: That shows the difficulty and the appropriateness, I think, in stating in substance what the letter is about. The letter is in the record and it refers to an agreement between Basic and Universal, being two competing companies. Now, what I am about to ask is whether he had been a party to any such thing.

Trial Examiner Norwood: I don't see why you
35212 just can't ask him directly without any reference to the letter.

Mr. Hershberger: Except—

Trial Examiner Norwood: And after you get your evidence in, then you can say this refers to Commission's Exhibit so and so, and so and so.

Mr. Wooden: This is with reference—

Mr. Hershberger: That isn't usually the way we do it in the lawsuits I have tried. I have tried a good many. I don't claim to be an expert, but, nevertheless—

Trial Examiner Norwood: It makes quite a little difference in the circumstance of examining your own client, or somebody else.

Mr. Hershberger: I recognize that distinction, of course.

Mr. Wooden: I don't see any reference to any agreement between Universal and Basic.

Trial Examiner Norwood: What is the pending question, now?

By Mr. Hershberger:

Q. Did you do anything about this letter prior to the time it appeared in the Federal Trade Commission case?

A. No, I never saw or heard of it.

Q. Had you made any statements to Mr. Holway that you would discontinue trucking at Pittsburgh on December 1, 1931?

35213 A. No, and nobody in our organization had authority to make such a statement even if he had wanted to make it without consulting me.

Mr. Hershberger: I think that is sufficient on it.

Trial Examiner Norwood: If any such action had been taken, you would have known it; is that right?

The Witness: I am sure I would, sir, because while I have got to depend upon my assistants, certainly I think they have enough sense not to do a thing like that.

Mr. Wooden: He testified the action was taken on December 1 already.

Mr. Hershberger: Yes, but he is testifying here that he didn't tell Mr. Holway that he was going to do it.

Trial Examiner Norwood: Yes. All right. Go ahead.

By Mr. Hershberger:

Q. I show you, Mr. Stone, Commission's Exhibit No. 2203, and ask you whether you wrote that exhibit and sent it to Mr. Cree, of the Aetna Company.

A. I certainly did not write it; to the best of my knowledge and belief, I never saw it before it appeared in this case.

Q. You made inquiry from others in your organization to see whether they might have written that to Mr. Cree?

A. I have.

Q. And who were those individuals that you inquired of?

A. Why, there were four or five or six people
35214 handling our business relating to that section. I know, for instance, a man located in Waco, Texas, or in New York, could not have had anything to do with it. I inquired from those people who, if anybody in our company, would do such a thing, would be the one that would do it.

35215 Q. Mr. Stone, I show you Federal Trade Commission's Exhibit No. 1896, being a letter from Robert Kingery to Universal-Atlas Cement Company, and Federal Trade Commission's Exhibit No. 1897, being a letter from Universal-Atlas Cement Company to Robert Kingery, both in May, 1933, and ask you to state
35216 whether you refused to sell the Department of Public Works and Buildings of the State of Illinois the cement referred to in those communications?

A. The two exhibits are copies of telegrams, I think, and not letters, and as I read them I am quite sure they are accurate. They state, "We do not see our way clear to change prices in our bid to you April 12."

Q. Is April 12th the period referred to in Federal Trade Commission's Exhibit 1897, shown on the abstract

of bids, which is Federal Trade Commission's Exhibit No. 1892?

A. Yes. This is a tabulation of bid received by the State of Illinois April 12, 1933. I am speaking of Exhibit 1892.

Q. What was your reason for refusing to accept an order tendered to you by Mr. Kingery, by the telegram shown as Exhibit No. 1896?

A. Because the offer was an offer for prices lower than we had quoted them at the time the bids were opened April 12, 1933.

Q. And lower than you were willing to accept?

A. Yes. We state here, "We regret we do not see our way clear to change prices."

Trial Examiner Norwood: How much lower was that?

The Witness: I did not look at the figures. I remember the offer that they made was delivered prices, which, after freight was deducted, would be equivalent to so-
35217 called mill net of $1.10 at our mill.

By Mr. Hershberger:

Q. Can you state whether the bid which you had made on April 12, 1933, would have yielded the larger mill nets than $1.10?

A. Yes.

Q. And that appears by the arithmetic, as shown on the abstract of bids?

A. Surely.

Q. Exhibit 1892.

A. Yes.

Mr. Wooden: Are you referring to the average, Mr. Hershberger, or specific cases?

Mr. Hershberger: I am referring to any of them.

Trial Examiner Norwood: How much larger would they have been?

The Witness: They vary.

Trial Examiner Norwood: Go ahead. The abstract will show it.

The Witness: Yes, sir; that will show it. It is a matter of arithmetic—the deduction. There is some further detail on it.

By Mr. Hershberger:

Q. Mr. Stone, I show you Commission's Exhibits 1107-B to J, inclusive, and 1107-M to Q, inclusive, being invoices

from the Universal-Atlas Cement Company to T. H.
35218 Maddux & Company at Marshall, Va. I believe in each instance the price is $2.26 per barrel delivered. Will you state whether at the time those invoices in question are dated, and the deliveries made, referred to therein, you were charging the State of Virginia a higher price for its cement than you were charging to T. H. Maddux & Company?

A. I don't see any invoices to the State of Virginia, but it is quite apparent to me from an examination of these invoices, 1107-B, and so forth, that they cover shipments on sales that had been made at some previous time. In other words, the sale had been made at a price in effect at the time it was made, and the shipments were made against that sale or contract from time to time. Now, if we sold the State of Virginia, or quoted the State of Virginia, at the time of these invoices, the prices to the State of Virginia at the destinations named on the Maddux invoices would not necessarily be the same as the Maddux invoices.

Mr. Hershberger: That is what I wanted to bring out. I think there are in the record, Your Honor, some exhibits showing different prices to the State of Virginia, and I wanted to bring that out.

The Witness: There is something on the face of each invoice that shows me instantly that they are shipments on an old contract, rather than on a current sale.

By Mr. Hershberger:

35219 Q. Mr. Stone, showing you Federal Trade Commission's Exhibit 1043-4-0, dated December 30, 1931, had you agreed with other cement manufacturers to stop trucking into the Cleveland district on or after January 1, 1932, as stated in that exhibit?

A. No, and I can answer it so definitely because we had not been trucking in Cleveland at that time.

Q. That was prior to your establishment of your warehouse in Cleveland?

A. That was prior to the establishment of our warehouse in Cleveland, or the practice of trucking in Cleveland, by our company, or by, or for our dealers.

Q. I show you Commission's Exhibit 1043-3-H, and refer you to the last sentence of paragraph 2 thereof, and ask you to state whether you had made any statement to Mr. McKee as referred to in that exhibit?

Trial Examiner Norwood: Does not the exhibit indicate or state that he made such a statement?

Mr. Hershberger: The exhibit indicates that Mr. McKee had said that Universal had agreed to do something.

Trial Examiner Norwood: I see.

A. No; I never said anything like this to McKee, nor did anybody else in our company.

Mr. Wooden: I move to strike the last part of his answer, as an observation, and as incompetent.

35220 Trial Examiner Norwood: Read the entire statement, Mr. Reporter.

(Last answer read.)

Trial Examiner Norwood: The motion is allowed as to the words "nor did anybody else in our company."

By Mr. Hershberger:

Q. When you said you never said anything like this, did you say anything of a similar nature?

A. No, I did not say that, or I did not talk to McKee on the subject.

Q. Did you inquire from others in your company as to whether they had talked with Mr. McKee?

A. I did.

Mr. Wooden: The same objection, to the whole line.

Trial Examiner Norwood: Objection sustained.

Mr. Hershberger: Just a moment, Your Honor. There is not any objection to that particular question. I have not asked him what was said.

Trial Examiner Norwood: Well, it is a sort of useless question, unless you are going to let him give the conclusion.

Mr. Hershberger: Well, that particular question would be a preliminary question.

Trial Examiner Norwood: It may stand.

35222 By Mr. Hershberger:

Q. If anyone in your organization had talked with Mr. McKee along the lines indicated in Federal Trade Commission's Exhibit 1043-3-H, would it have been brought to your attention in the ordinary course of

35223 your business?

A. It would have, and I may add that there was nobody in our organization with authority to make any such statement to McKee except myself or Mr. Affleck.

No one could say that that knew what he was talking about, and surely they did not have authority to say it because they don't know or didn't know that we were going to take the action that was indicated there.

Trial Examiner Norwood: He can certainly tell us that his company took no official action along that line, and base his statement on the fact that if any official action had been taken, it would, in the due course of business, be taken by him or it would have come to his official notice.

Mr. Hershberger: Of course, this refers—

Trial Examiner Norwood: For him to say whether somebody else made a statement outside, that is something else.

Mr. Hershberger: I recognize the difficulty with it, Your Honor, and I was appealing to the relaxation of the hearsay rule to an extent which would be, as I thought, perhaps permissible in this proceeding.

Trial Examiner Norwood: Yes. Well, I think this is a point that demands direct evidence.

By Mr. Hershberger:

Q. I call your attention, Mr. Stone, to Federal 35224 Trade Commission's Exhibit 988-C to F, inclusive, and calling your attention to the second paragraph, Exhibit 988-E, referring to Louisiana, did your company prepare a freight rate book for the State of Louisiana for distribution to other cement companies?

A. I remember this. Oh, no, we didn't. Our company did not.

Q. Did you prepare a book for any other State?

A. No, we did not.

Q. For distribution to anybody?

A. No.

Q. I show you Commission's Exhibit 988-A and B, calling your particular attention to the first sentence in paragraph 3 thereof, the first and second sentences, and I ask you to state whether your company ever used the freight rate service of the National Freight Rate Bureau referred to in that letter.

A. We never did use such a service.

Trial Examiner Norwood: What is that letter? Who wrote it?

Mr. Hershberger: Your Honor, it is a letter from J. B.

Johnston to R. R. Caskey, and it says that various companies used the National Freight Rate Bureau, and says "such results in uniformity." I want to point out that we don't, and never did that.

35225 By Mr. Hershberger:

Q. I call your attention, Mr. Stone, to Federal Trade Commission's Exhibit 1043-H, and directing your attention to the first line of that exhibit, I ask you to state whether the Universal-Atlas Cement Company had any agreement with other cement manufacturers that you would discontinue trucking from December 1, 1931, to July 1, 1932, as stated in that exhibit?

A. Why, of course not.

Q. And you had no agreement to discontinue trucking otherwise than as stated in that exhibit?

A. No.

Mr. Wooden: Do we have to lead that much?

By Mr. Hershberger:

Q. Did you have any agreement with anyone that you would discontinue trucking?

A. No.

Q. I show you Federal Trade Commission's Exhibit No. 42-A, B, and C, and ask you to state whether you wrote that, or mailed it or sent it to Mr. Cree of the Aetna Company?

A. May I look at it a minute?

Q. Yes.

(Pause.)

A. I never wrote it, and, to the best of my knowledge and belief, I never said it or heard of it until it

35226 appeared as an exhibit in this case.

Q. If there were testimony in this record from Mr. Johnson, of the Aetna Company, that he presumed he had received that from Mr. Stone, would your answer be any different?

A. Why, I think he is simply mistaken.

Q. Would your answer be any different if there were testimony in this record by a Federal Trade Commission trial examining attorney to the effect that he had been told by someone in the Aetna Company that it had been received from Mr. Stone, would your answer be any different?

A. My answer would be the same. I don't know what he may have been told, but there is a misunderstanding on the part of one of them, or a misstatement, because I certainly did not write it.

35227 Q. If you had written this document, Mr. Stone, would you have any reason to doubt that you would remember it?

A. I don't see how I could possibly forget it.

I would like to state on my own hook that I know that I did not write it.

Q. And you did not send it up to Mr.—

A. No, sir; I never saw it or heard of it until it appeared as an exhibit in this case.

Q. All right.

I show you Federal Trade Commission's Exhibit 417-AA to DD, being a letter from F. R. Johnson to A. J. Rooney, Huron Portland Cement Company, purporting to copy a letter sent to you. Will you refer to that exhibit and state whether you attended the meeting referred to therein, and what the occasion for that meeting was, if you did so attend it?

A. I remember this exhibit. It is quite long, and I have not taken the time to read it through carefully. If I received such a letter as that copied in this Exhibit

35228 417-AA, and so forth, I have forgotten the letter.

I do recall that I attended the meeting that I presume is the one that is referred to in this letter. It was in the middle of May, 1935, and there were various complaints, as I remember—well, I am getting a little ahead of my story. I was asked by someone, I don't remember by whom, to come up to a room at Mr. Johnson's request, in the hotel, and when I got there I found several other people. I can't remember who all of them were. I soon learned that Mr. Johnson was rather exercised about complaints that had been made against his company for violation of the Code that had been made against his company to the Code Authority, and various things were talked about there in the way of the details of those complaints, which were practically Greek to me, and I didn't know the details. That is the reason I have not read the details again in the letter.

Q. The letter refers to those complaints, does it not?

A. Yes.

Q. Was there any agreement made at that meeting be-

tween your company and other competitors as to what should be done in the future?

A. None at all. It was simply argument as to whether this, that, or the other act committed or omitted by the Aetna Company constituted a violation of the Code. By "Code," I mean N.R.A. Code.

35229 Q. I call your attention, Mr. Stone, to Federal Trade Exhibit No. 28-A to D, being a letter from the Aetna Portland Cement Company, H. S. Cree, to Mr. O. J. Lingeman of the Aetna Portland Cement Company, May 20, 1935. In the last paragraph of the letter is a reference to Universal at Menominee. Can you state what that refers to?

A. The date of 28-A, and so forth, is May 20, 1935, and without having read any of it except that point that you direct my attention to, it seems to indicate that it refgers to or follows up this same meeting referred to in the exhibit we were talking about a moment ago, and one of the items talked about apparently was—no, I beg your pardon. I hadn't read it closely enough to get the significance. I jumped at a conclusion because of the date being near the date of the other meeting.

This has to do—this last page, 28-D, refers to, among other things, the operation such as the Universal recently enacted at Menominee. We didn't enact anything at Menominee. The Aetna Company was shipping cement by water to Menominee, from which point it was distributed out to the purchasers out into the territory around and about.

Q. By what means of transportation?

A. By truck. That, I think, was started in either 1933 or 1934.

Q. Did you do anything about it?

35230 A. Because of what they were doing we began to lose business in that locality, in the territory around there, and we watched it and worried about it for some time until finally we, ourselves, made arrangements to transport cement by water to a warehouse, and, at one time, we had a supplementary warehouse; that is, a warehouse and a temporary warehouse, and from those warehouses our cement was distributed by truck to the customers, the buyers in the surrounding territory.

Q. You did that to compete, did you?

A. Purely to complete. As I say, we worried about it

for some time before we went into it, because it was a very expensive proposition. It cost us a lot of money, but we could not afford to lose our position in that territory where we had been doing business for years.

Q. Did you put your warehouse into Menominee, itself, or—

A. Oh, no, we had one at—I think the main one was at Kipling, and the one I will describe as a supplemental warehouse for a short time was—oh, it is some other town there in Upper Michigan. I forget even what it was.

Q. But Kipling and Menominee were in—

A. Yes, those distances in the West, you know, are quite different from what we know down here in the East, but, in general, they were in the same general territory.

Mr. Hershberger: I think that is all of Mr. Stone.

Trial Examiner Norwood: Cross-examine him.

Cross-Examination by Mr. Wooden.

35231 Q. Mr. Stone, referring to Commission's Exhibit 417-AA to DD, which Mr. Hershberger asked about, who were present at the meeting of the Cement Association that is referred to in 417-AA?

A. Well, the meeting of the Cement Association, sir, you don't mean that, I don't take it; not the meeting of the Portland Cement Association.

Q. Well, no.

A. This was simply a meeting while that group was in town.

Q. That is what I mean, a group meeting.

A. As I stated, Mr. Wooden, I did not read that entire exhibit. It consists of several pages. I didn't read it carefully. I spoke only on that part that Mr. Hershberger asked me about. As I stated in my answer on direct, that I do not recall who was there. I know that Mr. Johnston was there, Mr. Rohwer of our company was there, and I was there, and Mr. Reiter was there, he then being with the Code Authority and not with our company. I believe that Mr. Rooney was there, but I don't know. I can't remember to save me whether Cree was there or not, nor can I remember whether Lingeman was there.

Q. Wasn't Mr. Jennings there?

A. I am not sure. I just can't remember who was there, and I am very definitely trying to remember.

Q. Were there any other Michigan companies represented there?

35232 A. I imagine that the ones that I felt sure were there were not Michigan people except Rooney. I have stated that there were a number of people there, but I cannot name them. If I named Mr. Rooney as having been there, I am merely stating a belief, and I cannot tell definitely about Lingeman and Cree. I imagine that they were there, one or the other, and perhaps both, but I do not remember it.

Q. Well, this group discussion had to do with matters affecting primarily the Michigan companies, did it not?

A. I would say primarily the Aetna Company.

Q. It had to do primarily, or largely, at any rate, with matters arising in Michigan?

A. That is right, and I think with particular respect to the Aetna Company.

Q. Do you have any recollection of any other Michigan companies being represented?

A. I do not recall, Mr. Wooden, all of the things that happened there, or all the conversation. By the same token, I simply do not remember the individuals who were there. I do remember that I was asked to come to this room by someone whom I do not remember. I can state a belief on that, but I do not remember it.

Q. What is your belief?

A. "Belief" is not the proper word. I think I have read in a record, either in this case or another, that

35233 Mr. Rohwer stated that he was the one that had been asked to ask me to be there.

Q. You say this meeting which is referred to in Exhibit 417-AA occurred in June, 1935?

A. No; it occurred in May, 1935—about the middle of May.

Q. Did it not occur after the date of the letter which is in evidence as Commission's Exhibit No. 28? That was May 20th.

A. I did not read that closely enough. I answered a question about only one part of the letter. I did not look at the full letter, and I recall only one part. The Portland Cement Association meeting, I might say, is usually about the middle of May; that is, it is two or three days around the 15th. You say this Exhibit No. 28 is dated May 20th?

Q. Exhibit 28. That is my recollection.

Mr. Hershberger: Yes.

The Witness: Is it dated May 20th?

Mr. Hershberger: Yes.

The Witness: I think that is what you said a minute ago.

By Mr. Wooden:

Q. Do you say it was before or after May 20th?

A. I would say, before reading this letter, if it was written on May 20th, it may very well have been written after the meeting in the Waldorf room that we are speaking of. Is that your point?

Q. Yes. Well, I am talking about a meeting that
35234 is referred to in Exhibit 417-AA as having taken place on the occasion of the Cement Association meeting in New York.

A. That is right.

Q. And I am asking you to try to fix the time.

A. That Association meeting was held, unless there was a very great change of date, and, of course, I do not remember that far back, in the week just before or just after or in which May 15th occurred. It is always right around that date.

Q. Did you reply to the letter which Mr. Johnston says in Exhibit 417 that he forwarded to you on June 12th?

A. No.

Q. Do you make that statement just offhand, or did you ever make any effort to locate such a letter?

A. I did; yes. That is, I made an effort to locate anything I have along that line, but I am sure that I did not write such a letter; that is, I did not write a letter in reply to such a letter as that.

Q. Now, with reference to those invoices in Virginia of Maddux Company, I forget the number of the exhibit—

A. Yes.

Q. Will you tell us what it is on them that shows that they were carrying out an old contract?

A. We have a practice in our company, which was in effect ever since I have been working with them,
35235 that when we make out a notice or an order from which the invoices are written up, to show on the face of it the purchaser's order number, usually, when we know it, but certainly an order number of our own, and we usually have that order number preceded by an initial, such as "B," for Birmingham, or "L" for Leeds, or

"Buf" for Buffington, or whatever you may use. Now, if it is an order in which shipment is made at one time, it bears simply an order number, like 18267, but if it is a contract, a part of which we make shipments on over a period of time, then that number would be 18648, and the first shipment made on it would be 18,648 pro 1, and the tenth shipment would be 18,648 pro 10, the second would be 18,648 pro 2. If we shipped a car per day, the shipments would be made on 18,648 pro 1, 18,648 pro 2, 18,648 pro 3, 18,648 pro 4, and so forth.

Q. Can you tell us from the invoices in question what the date of the old contract was?

A. No, I cannot.

Q. You cannot tell, without knowing the date of the contract, whether the price was different from the one obtaining at the time of shipment, or not?

A. I think there was an exhibit or testimony or a record some place, where they showed me that that indicated two prices. I think it was $2.26, or $2.34, and when shown those invoices, I immediately saw that they were sales not made at the same time as the quotations to the State of Virginia. That is a different price.

35236 Q. You do not know whether you made any changes in price between the date of that contract and the date of sale, do you, to the State of Virginia?

A. We looked up that point at the time it arose, and I know that that was the case. I cannot give you the details of it. It was something that we looked up, and that was the explanation.

Q. You made no changes?

A. What is that?

Q. You made no changes in the interim?

A. Well, now, wait a minute. I do not know that I made the answer entirely clear, but the intent is this, my meaning is this, that we did look up and find that the Maddux invoices were invoices at a price on an old contract, sold at a time that our price at the destination place was lower than at the time that we made the quotation to the State of Virginia.

You did not bring that information in as to the date and the price that obtained?

A. I did not; no.

Q. Now, Mr. Stone, referring to Respondents' Exhibit 2523, which contains a list of the various types of cement made—

A. Yes.
Q. —In 1939.
A. Yes.

Q. I take it that those were a gradually increas-
35237 ing number over a period of years, and that some of them had been made for a comparatively short period of time, and others for a long period of time; is that correct?

A. The period will vary; yes.

Q. I notice that you have listed here in this exhibit four different specifications for standard Portland cement, in addition to the regular specification, A.S.T.M. specification.

A. In each case you will find some sort of variation. This may be a standard specification, and one fellow will say, "Put a little of this or that in," and another fellow will say, "Put a little less of this or that in," or "Grind it a little finer or a little coarser," or something of that sort.

Q. Is there any difference here in these four additional standard specifications, other than the fineness of grinding?

A. I would have to look back into that to see. I tried to describe it very briefly, but I think that is the case. Which four do you mean?

Q. Down here (indicating on document).

A. Oh, yes.

Q. "2,000 cm." and "2/gm." What do they mean?

A. That is the specific surface area. I will have to look up those definite symbols.

Q. "cm" means centimeters, and what does the "gm" mean?

A. It is the surface area per square centimeter.

Q. I notice also on this exhibit you have the fed-
35238 eral specification for standard cement.

A. Yes.

Q. Where does that fall in reference to these other four?

A. That is right close to the standard A.S.T.M.

Q. Lower than your lowest finer ground standard that is on here.

A. I do not remember whether there is a difference in the grind between those two or not. See, these are technical questions that I do not pretend to be as familiar with as those people who are living with them day in and day out.

Q. In general, who is it that calls for these different finenesses of grinding that are shown here, or standards?

A. Various purchasers. The purchaser gets an idea that this, that, or the other change should be made in or away from standard, which will produce a cement that will be beneficial for his particular line of work. I would say that one of the first real large departures was the Boulder Dam, followed by T.V.A.

Q. That is this moderate heat cement, is it not?

A. Yes; I was simply using that as an illustration.

Q. Well, I am talking about varying grades or qualities of the standard, the so-called standard cement. Do the different dealers require different finenesses of grinding?

A. I do not believe you will find it among dealers so much, unless their customers make demand on them. It is the customer of the dealer rather than the dealer, himself.

35239 Q. Is not that ordinarily the unusually well informed customer?

A. Yes, sir.

Q. An engineer, or architect, something like that, who goes into these varying refinements.

A. One who is unusually well informed, or thinks he is.

Q. Well, do these differences in the fineness of the grinding of standard cement make a difference in the utility or the usefulness of the cement on various jobs?

A. In general, I think I might say that the finer the grind, the quicker the initial hardening, but, again, let me say that I am not a chemist, and I am not an expert operator, and I do not pretend to be 100 per cent perfect in details of this kind.

Q. These customers who do call for these different specifications evidently think that they are getting some special utility out of that particular quality?

A. I imagine they do.

Q. Now, how finely ground is your high early strength?

A. There, again, Mr. Wooden, I think I am not up on the technical details. I can always get this information at a moment's notice, but I do not carry it in my mind.

Q. You have no idea how close in fineness of grinding your highest quality standard cement is to your high early strength?

A. The standard of grind, I think, will run around 1,500, and I think the high early grind is up above,
35240 say, 2,200, or something of that sort. That is a thing I do not pretend to be accurate about.

35244 Washington, D. C.,
March 21, 1940.

35245 FREDERICK L. STONE thereupon resumed the stand and testified further as follows:

Cross-Examination by Mr. Wooden (Continued).

Q. Mr. Stone, did you not call on Mr. F. R. Johnson, of the Aetna Company in Boston, along in the fall of 1935?

A. I have called on Mr. Johnson, but I do not recall having done so at the time you mention.

Q. Did you call on him in Boston?

A. Yes, sir.

Q. How many times?

A. I am not sure whether it was once or twice. It was certainly not more than twice. I may have been in his office a second time.

35246 Q. How far apart were those two calls?

A. I don't know; that is, I know that they were not real close together.

Q. Well, were they a matter of weeks apart, or months, or years, or what? Can you say that?

A. They could not have been very many years, of course, because I did not know him for many years. They were not weeks, but whether it was three months or six months or eighteen months, I don't remember.

Q. Did you go there to discuss with him some of the trade conditions and competitive conditions in Michigan, in which his company was concerned?

A. No, sir. I went there to make his acquaintance after we acquired the Atlas plant, and my business in New York was more frequent than theretofore. We had an office in Boston, and the distinct purpose of my first call on him was to try to get him to join the Portland Cement Association.

Q. You did participate in meetings at which these trade conditions in Michigan were discussed, such as the one you talked about yesterday of the Portland Cement Association in New York in May, 1935.

A. I was at that meeting, but I do not recall being at others where Mr. Johnson was present.

Q. You had representatives of your company present at meetings where Mr. Johnson was present; had you not?

35247 A. I would not say that I had them present. I know from hearsay that others in our company became acquainted with Mr. Johnson. I could not state the circumstances under which they met him, but, naturally, in ordinary talk, I would learn that they had met him.

Q. From your own people, you mean?

A. From our own people—from the people in our company; yes.

Q. Did you get a report from them on the meeting in Chicago on December 6, 1935?

A. That date does not mean a thing to me. I do not know of a meeting on that date.

Q. Did you get a report from any of your representatives of a meeting at which Mr. Johnson read a statement of what his company was going to do?

A. To the best of my knowledge and belief and recollection, I never heard of his reading the statement to which you refer until I saw mention of it in this case.

Q. Your company had certain portions of Lower Michigan in which it was affected by conditions or practices of the Aetna Company.

A. We tried to do business in Michigan, and we were affected by such things as you mention, just as we were in any part of the country where we attempted to do business.

Q. You were affected by such things as the Huron Company putting in a base at Muskegon.

35248 A. That would affect such things as we tried to do in Michigan. Just what that affect was, I do not recall, because I do not remember the figures used as a so-called base price at Muskegon. They may have raised some prices in Michigan, as far as I know.

Q. As a matter of fact, did it not adversely affect your company—the installation of the base at Muskegon by the Huron Company?

A. As I say, I do not remember the figure that was used when Muskegon became a so-called base. It may have raised some prices, for all I know. I do not say that they did, but I just do not remember what the figure was when it was put in.

Q. Is not the usual effect of a new base being put in to lower prices in the vicinity of that base?

A. I do not know whether you can use the word "usual." It simply depends, Mr. Wooden, on the figure that the company that puts in that base uses. It may use a higher one—or it may effect an increase. It is possible, either way.

Q. You have no recollection as to how that affected your company in the case of Huron Company base at Muskegon?

A. I do not remember what the figure was that they used when it was put in.

Q. Now, showing you Commission's Exhibit 43-B, which is a letter of Mr. Cree, I believe, to Mr. Lingeman, and referring to the first two paragraphs there, does not that refresh your recollection of the base put in
35249 by the Huron Company in Muskegon, which resulted in a lowering of the price in that vicinity?

A. The paragraph states that—

Q. Well, I am asking you if it refreshes your recollection on that.

A. It does not, Mr. Wooden, in that I simply do not know the figure that Huron used as a so-called base at the time they established Muskegon as a base.

Q. Were you familiar with the conditions in Michigan during the fall of 1935?

A. To an extent. Of course, you must realize that we have some 37 States east of the Rockies in which we do business, and if that question were asked me about Massachusetts and Florida and Alabama and Texas and Kansas and Iowa, why, obviously, I do not know the intimate details with respect to one individual State, as a matter of memory. Of course, we were doing business there, and I know, or I knew at the time, something of what was going on, but I am not letter perfect in what conditions were at that time in that particular State.

Q. You had representatives located in the State, sales representatives?

A. Yes.

Q. Where?

A. We have had a different number of traveling
35250 representatives in the State at different times, but, you understand, those traveling representatives re-

port to certain persons in the sales department, who supervise their activities in the State.

Q. Did you have some sales offices in the State?

A. No.

Q. Did you have a resident salesman at Detroit?

A. That is, as of that particular date?

Q. Yes.

A. Which, I believe, was the latter part of 1935?

Q. Right.

A. I am quite sure we did not.

Q. Did you have a resident salesman at any city in Michigan?

A. Yes, those who travel in Michigan live at some town in their territory, as a general rule.

Q. What portions of Lower Michigan was Universal selling in at that time?

A. We were attempting to sell in all parts of Michigan to the extent that we could.

Q. You had dealer-customers in Michigan?

A. Some, yes, not as many as we would like to have had, or to have now.

Q. Did you have some complaint from Michigan dealers about that time as to the sales being made by Aetna to other dealers?

A. Of course, Mr. Wooden, it is very difficult for 35251 me to say that I remember any specific things that occurred at that particular time or in that particular period which I understand to be along toward the end of 1935. I don't know whether we had any complaints at that time or not from dealers in regard to Aetna's actions.

Q. Did you have dealer business in Detroit at that time?

A. Not to amount to anything.

Q. You had some?

A. I don't even know that we had any. Of course, it was very small, in any event.

Q. You had dealer trade in Grand Rapids?

A. I know we endeavored to sell in Grand Rapids, whether we succeeded in selling anything at that time or not, I don't remember.

Q. Did you have dealers in Mount Clemens?

A. Oh, I couldn't answer that. I don't know individual towns around the territory.

Q. Did you have dealers in Battle Creek?

A. We have had. Whether we were selling anything in Battle Creek at that particular time, I don't remember. I know that we have endeavored to get business in Battle Creek and I, myself, have called on dealers in Battle Creek.

Q. With regard to water shipments such as you testified to on direct, I understand that your water shipments from your Hudson mill, the primary reason for mak-

35252 ing them was because of their cheapness?

A. The primary reason for making shipments from Hudson—cheapness as against what?

Q. As against any other method of transportation.

A. Oh, the shipments by water?

Q. Yes.

A. Our mill is so located at Hudson that we believe that it is more desirable for us to ship by water than to confine our shipments to rail, although we do make some shipments by rail and some water and rail.

Q. Do you ship both up and down the Hudson by water?

A. I don't recall any movements up.

Q. Are they primarily to New York City by water?

A. Yes.

Q. What percentage of your shipments at Hudson are by water?

A. This would be just a guess, because I haven't had occasion to look it up recently. I would say, as a guess, that of the total shipments that move out of the Hudson mill, probably from 10 to 15 percent are by water or by water and rail.

Q. How much below the rail cost of transportation to New York from your Hudson mill is the water rate?

A. I don't recall the rail rate and I don't recall what we are paying for water transportation at this time. I have known, but I don't carry those figures in my head.

Q. Do you ship any carload quantities by water?

35253 A. Any carload quantities by water?

Q. Yes. I mean single carloads. In other words, do you ship as little as 300 barrels by water?

A. Oh, I think not.

Q. What is the smallest quantity that you have known to be shipped by water from your mill?

A. The charge for water transportation varies, and I don't recall the figures, according to the quantity in the

load. I don't believe we make any appreciable number of water shipments of quantities less than a thousand barrels, and we would prefer to make it higher than that because the rate per barrel would be somewhat less.

Q. You make some water shipments to dealers?

A. Yes, those who are so located as to handle it conveniently.

Q. You also make some water shipments to your own storage plants or warehouses?

A. Are we still talking about Hudson only?

Q. I guess we are beyond that now.

A. We are beyond that?

Q. Yes.

A. Yes, we do make water shipments to some storage stations owned or operated by ourselves.

Q. Where is that done?

A. Milwaukee, Muskegon, Green Bay.

35254 Q. Shipping from Buffington?

A. From Buffington, yes.

Q. Do you also make some shipments to customers by water from Buffington?

A. I don't recall a single case of that kind for many years.

Q. There have been some in the past?

A. Yes.

Q. How about Hannibal? Do you make any deliveries from Hannibal by water?

A. We have made occasional water shipments to customers from Hannibal.

Q. And in what quantities?

A. Usually in quite sizable quantities.

Q. As much as a thousand barrels that you referred to in the case of Hudson?

A. I am not as distinct in my recollection with regard to Hannibal as I am with regard to Hudson, but I am quite sure that the Hannibal shipments would be in quantities in excess of a thousand barrels.

Q. With regard to trucking, has it been your policy to make the price on cement delivered by truck the same as the delivered price would be if delivered by rail?

A. I don't know that I would say, Mr. Wooden, that we have a truck policy, because we do different things at different mills of ours. In general, I think that where

we deliver, that is, control the truck movement, or
35255 where the truck is owned or hired—or hired by ourselves; we don't own any—that we make the destination price the same as our price at that destination would be f.o.b. cars.

Q. And when and if buyers send their trucks to the mill, then do you follow the same method of pricing, or do you—

A. It is different at different mills as between those two methods, and it is not comparable to the other that you speak of, because one is where we lay down the cement at destination, and the other is where we load it on a truck at the mill, so the two things differ, and I don't think that you can compare them in answer—in the way that your question asked for a comparison.

Q. Yes, but I want to know what price you charge where the customer provides his own truck.

A. As a detached question, that is all right, but your other question was somewhat involved to me.

Q. Well, just answer this one.

A. Where a customer comes to a plant of ours, where trucks are served, our price for cement loaded on the truck at the mill is different at different plants of ours.

Q. Well, except at Duluth, is it not a fact that—

A. Understand, I am not trying to avoid anything—

Trial Examiner Norwood: Just wait a minute. Let him finish his question.

35256 The Witness: I am just trying to keep clear.

By Mr. Wooden:

Q. Except at Duluth and at Buffington, is not your price loaded to trucks the same as the delivered price would be by rail at the point the customer wants to take it?

A. I think that is true in each case. Understand, you are injecting now other locations than our mills.

Q. Yes.

A. And your other questions were our mills only.

Q. Yes.

A. I did not have in mind what you were driving at.

Q. And at Buffington, what is it—a premium of so many cents over the base price?

A. I would not call it a "premium"; no, sir.

Q. Well, an addition.

A. We charge a customer who comes to Buffington with

his truck to be loaded a price that is 15 cents higher than our so-called price base at Buffington.

Q. And at Duluth, what is the arrangement?

A. At Duluth we load the customer's truck when he comes to the mill, at a price which is the same as our so-called price base at Duluth.

Q. How long have you been following that policy at Duluth?

A. I would rather call it "practice" than "policy."

Q. All right.

35257 A. And I cannot remember when that practice began, because it was some years back.

Q. Was it three or four or five, or what?

A. Well, at least that.

Q. More than five?

A. Yes.

Q. And how long have you been following the 15-cent differential at Buffington?

A. I think since about either 1932 or 1933.

Q. And it has been continuous since then?

A. No. There has been one comparatively short interval in which we took what you call the "differential" off, and later put it back on.

Q. When was that?

A. 1932, I think.

Q. That you took it off? As a matter of fact, did you not first put on a 15-cent differential in 1930 at Buffington?

A. I am talking from memory only, and you notice that I hesitated with regard to the time. It is possible that it was 1930.

Q. And 1932 was when you took it off temporarily; is that right?

A. That is as I recall it.

Q. You discontinued trucking completely then for a while, did you not?

35258 A. No.

Q. At Buffington?

A. I don't believe—well, I see what you are getting at. There has been trucking out of Buffington into the State of Indiana. That was discontinued, but trucking was continued from Buffington into Illinois. Just when that discontinuance to Indiana occurred I do not remember.

Q. Why was a different practice followed in Indiana from that followed in Illinois?

A. The principal reason was that Indiana dealers did not like it; did not want it.

Q. In Illinois the dealers were not so much opposed to it; is that the idea?

A. No; some did not like it, and others did, but, understand, when we get into a question of this kind, I cannot just pick out one individual reason and say that that was the all-controlling reason.

Q. Is it not a fact that in that vicinity the small dealers favored trucking and the large dealers opposed trucking?

A. In which vicinity?

Q. Around Buffington.

A. In Indiana?

Q. Yes.

A. Or in Illinois?

Q. Either.

35259 A. It never struck me that there was any distinction between the two.

Q. You had a Mr. H. G. McCabe in your organization?

A. Yes, sir.

Q. Who was he?

A. He was a salesman.

Q. Is he still with you?

A. Yes, sir.

Q. Was he calling on the trade in the vicinity of the Buffington mill?

A. He has worked in various localities. At times he has worked there. I cannot give you the dates.

Q. Calling your attention to Commission's Exhibit 265-O, a document written by Mr. McCabe, did it come to your attention at that time that he was reporting that the large dealers were opposed to trucking and the small dealers were in favor of it?

A. May I read this?

Q. Yes.

A. (After reading document.) I have no recollection of this letter. It may have come to my attention. It is dated January 6, 1931, and I just do not remember it.

Q. You do not have any recollection or impression, either way, as to which way the large dealers or the small dealers reacted on the question of trucking?

A. As I stated in answer to a former question,
35260 it does not stick in my mind that there was a distinction.

If I may comment on that letter, I notice some statements in it that represent, perhaps, the thoughts of the writer, and a question of this kind, perhaps, is debatable among people in our own company. He states that all the small contractors—concrete products manufacturers and contractors, I think—have made investments in hauling equipment. Now, I think that is an extreme statement. I doubt very much if that was the exact fact. Here is a man who was expressing his opinions through statements of that kind, which is all right. We all do that, and we hold forth in our own company on our own ideas, and sometimes they prevail and sometimes they do not; but we are open to a free discussion among ourselves of anything in the nature of a problem.

Q. But you know that some dealers and contractors did make investments in trucking equipment?

A. I don't know that; no.

Q. You had differences of opinion in your own organization about the advisability of continuing trucking, I take it?

A. As on other things; yes.

Q. You said yesterday that dealers, in the main, did not like trucking, and I take it that you had in mind some dealers who did like trucking.

A. That some dealers did, you say?

Q. Yes.

35261 A. I never took a poll of them, and I could not mention names, now. I have had talks with various dealers, but other people in our sales department undoubtedly had more talks with dealers on the subject than I. Just in the day-to-day business, from information that came to me over my desk, I was under the impression that dealers generally were not in favor of trucking.

Q. You had some talks with some dealers who did favor trucking, as well as talks with those who did not?

A. I don't recall any dealer ever having made a plea to me for trucking. There may have been, but I don't recall them.

Q. Why was it, as you learned it from the dealers, that they didn't like trucking?

A. I think, Mr. Wooden, that the principal thought in the minds of at least the thoughtful dealers was that if trucking from cement mills became general manufacturers who were not within trucking distance would in all

probability establish some sort of sub-stations or packing plants located near the mills from which trucking was done, so that they would be on a parity with those mills, and the dealer had—what shall I say—the haunting fear that if that did occur, that if he should see a packing plant and warehouses handling cement springing up in his town, that sooner or later cement was going to get onto the basis of a peanut business where the dealer would be eliminated from the scene.

Q. And the manufacturers sell directly?

35262 A. Yes, sir.

Q. They were also fearful, were they not, that dealers would truck into the territory of other dealers and upset the markets there?

A. That was one reason, I think; yes, sir; take away business from him.

Q. As a matter of fact, you had also in mind a desire to avoid the upsetting or disturbing effects of trucking upon manufacturers' prices, too, didn't you?

A. Well, obviously, we don't like to see a price go down anywhere unless we think it is too high, but I think—

Q. Trucking tends to cause it to go down, doesn't it?

A. No, not in all cases. It might—

Q. Some cases?

A. The tendency might be the other way. I couldn't say.

Q. Then you should have been in favor of it where it caused it to go up?

A. Well, now, Mr. Wooden, when we get into this trucking I don't think we can take one single factor and exhaust that.

Q. I know we can't.

A. In its effect on the general situation. I have mentioned a moment ago what I described as a fear of dealers that stations would spring up around the country. Well, now, if they should spring up, who is putting up the money?

Trial Examiner Norwood: I think you have ex-

35263 plained that to us two or three times.

The Witness: Well, Judge, I was going at it from the—

Trial Examiner Norwood: If you will just make it a little shorter and more direct here—

The Witness: I will try to, sir.

And I think I can close that in just a word or two.

Mr. Hershberger: Your Honor— All right.

The Witness: And that is this: I described the springing up of warehouses from the dealers' viewpoint. Now, just a word or two from the manufacturers' viewpoint. The manufacturer would have to make investment in those warehouses, and, naturally, he didn't—why, those investments would run into enormous amounts, and that is why the manufacturer did not want to see such a thing come about.

By Mr. Wooden:

Q. Mr. Stone, are you trying to tell us that the manufacturers, including your company, had no thought in mind with regard to trucking that affected the delivered price of cement by the manufacturer?

A. No, sir; I didn't say that.

Q. Well, all right.

A. But I explained that that is just one factor, and I mentioned another one, which I thought was much more important.

35264 Q. As a matter of fact, trucking did tend to upset, disturb the ability of manufacturers to have the same destination price; didn't it?

A. I don't think I would say that; no, sir.

Q. It had no such tendency?

A. Maybe a bit more difficult to learn what that price is, but if I, as a manufacturer some distance from a mill was trying to compete with you nearer the market, where you are located near a market, and trucking is done by your mill, when I found out what the cost to the customer was at his destination—

Q. How are you going to find out in the case of trucking? You couldn't find out, could you?

A. Well, in the best way we can.

Q. But you didn't know what it was going to be.

A. You might say the same—

Q. You felt there was some uncertainty about what the delivery price would be?

A. You might say the same thing, Mr. Wooden, with respect to—well, say, what has been referred to here as an arbitrary price in the town of Podunk, which is across the river in some States from the town of Squeedunk. We simply learn what that price is. Now, in the case of a truck, we would try to learn from the customers what it

was costing them to get your cement to the place they want it.

35265 Q. It was more difficult to find out?

A. Oh, perhaps so.

Q. Some mills were equipped for trucking and others were not?

A. Of course, I don't know about the other fellow's mills, as to whether he was equipped or not.

Q. You were well equipped for it, weren't you, for trucking?

A. Not when it began, and I don't know that you can say that we are well equipped; that is, perfectly equipped now, but I know that it cost us considerable money to do things around the plant to take care of such trucking as was done.

Q. Don't you know that some mills were not well equipped for trucking?

A. I can assume they were not.

Q. Don't you know they were not, from your general knowledge of the business?

A. From my general knowledge, I assume that they were not. I have not visited them, and I have not inspected them. I have read in the record that some say they were not, and I have no reason to doubt that they are not.

Q. Referring to Commission's Exhibit 2647-A and B, you had an assistant sales manager, J. K. Hallock; did you not?

A. Yes.

Q. Where was he located?

A. Pittsburgh.

35266 Q. Did you agree or disagree with his statement in that exhibit where he said that "Practically all the opposition to cement trucking has arisen from selfishness; that is to say, from manufacturers who are not in a position to profit from this mode of transportation."

A. I have some recollection of that letter, but I haven't seen it, and I don't remember the rest of it. I don't remember the context, but I think I mentioned a while ago that sometimes within our own organization we disagree among ourselves on various points. I remember that Mr. Hallock at one time, at least—

Trial Examiner Norwood: You have told us that.

The Witness: I beg your pardon. All right.

By Mr. Wooden:

Q. I am asking you a question as to whether you agreed with that statement of Mr. Hallock's?

A. Will you read it again, please?

Q. "Practically all the opposition to cement trucking has arisen from selfishness; that is to say, from manufacturers who are not in a position to profit from this mode of transportation."

A. I don't know that I would have used those words or expressed it that way, but I can suppose that you can say that any manufacturer is selfish when he wants a thing done or not done in a way that would make it easier
35267 for him than if it were vice versa.

Q. Isn't it a fact that your company was in a position to benefit by trucking?

A. A short answer to that is "No."

Q. Didn't you locate your mills near large markets in order that you might have the advantage of cheap transportation to those large markets?

A. I was not with the company when any of our mills were built except the Duluth mill, and I was not in a position at the time to have had any say with regard to that mill, and I really don't know what happened in connection with any one of our three mills. Of course, I can make a statement generally that it is obvious that one would like to be in as advantageous a location as possible, but different persons might disagree as to what that location might be in any particular instance.

Q. You have stated at one time or another, have you not, that a cement manufacturer that opposes trucking, and at the same time favors the construction of cement roads, is in an inconsistent position?

A. I don't know that I originated the thought, but I do realize that it sounds inconsistent.

Q. You said yesterday that competitors had quit trucking before Universal did. Didn't you mean by that that competitors had announced that they were quitting before you announced it?

A. As I recall, the notices so stated that we will
35268 quit it on a certain date. Others, I think, did not mention a date, but simply said, "We are stopping it except on old orders booked for that form of delivery." Now, that is from memory.

Q. Did the establishment of your Milwaukee and Green Bay and other packing plants or warehouses result from the trucking of competitors?

A. Yes.

Q. You said you were surprised to learn that the Huron plant at Duluth was charging 4 cents more for delivery to trucks that you were.

Isn't it easy to find outfrom your dealers or from dealers in that locality what the Huron Company was doing in that respect?

A. That is what I meant. I am not—perhaps I didn't express myself clearly. My surprise was that a thing like that had been going on and we had not learned about it.

Q. You mean to say that no one in your company knew about it?

A. So far as I know, they did not. I haven't traced it down with all of our people yet, but I have asked whether anybody knew about it. I can't conceive of their knowing about it without my knowing about it, without their telling me.

Q. It isn't always easy to know what your competitors are doing, then, in the way of prices?

A. In that instance, no, but I would say that we 35269 learn what we can to the best of our ability, and I have no doubt that there are many things that go on that we don't hear about.

Q. Why is it that you allowed trucking at Duluth and not at other places?

A. I think I answered a while ago. I don't remember when Duluth—or when trucking at Duluth began, but it has always been a comparatively small transaction, and I really haven't paid a great deal of attention to it.

Q. The dealers in that locality were opposed to it?

A. I don't remember that distinctly, but it is—at Duluth, as I say, the trucking has been in such a small volume that it simply hasn't attracted attention particularly.

Q. You cannot tell me whether the dealers in that vicinity are opposed to it or in favor of it?

A. I cannot say of my own knowledge; no.

Q. With regard to this filing that you made with the Code Authority concerning trucking areas around Milwaukee, I believe you said that was still in effect,

A. I have not been very close to that for the last few years, but my belief is that it is.

Q. Is the same true regarding the Green Bay filing that was put in through an exhibit, along with the exhibit relating to the Milwaukee filing?

A. The same answer with respect to that as to Milwaukee.

Q. Did you say something about a five-cent addi-
35270 tion for sales made for loading to trucks in Chicago?

A. Yes.

Q. Is that in addition to a 15-cent differential, or what is the relation?

A. No, sir. I think I stated—

Q. Is that on top of the Chicago delivered price?

A. Yes.

Q. How long have you been making that charge?

A. I don't remember the date, but it has been some years.

Q. More than three?

A. Yes.

Q. Now, as I understand it, when The Cement Institute was formed, the Universal did not become a member.

A. That is right.

Q. The Atlas mill, however, had been members.

A. The Atlas Company was a member of The Cement Institute from its formation, and continuously, I believe, until it went out of business, but its membership was limited to the northeastern and southeastern sections of the country. It never, so far as I have been able to learn by records, after we acquired the Atlas plants, was a member of the Institute for any part of the country except that that I have just mentioned.

Q. After the Universal took over the Atlas Company, what had been the Atlas mills continued for a time paying dues to the Institute; did they?

35271 A. Well, of course, Mr. Wooden, the Universal Portland or Universal Atlas Company did not take over the Atlas Company.

Q. Well, I am not being technical about it.

A. I simply want the statement in the record.

Q. I was not thinking of any technical method.

A. Well, those are—

Q. With that understanding, what is the answer to the question?

A. There was a provision—I cannot state it word for word—that when a membership in The Cement Institute terminated, the holder of the former membership was obligated to pay dues for a period of one year after the date of termination, and we had considerable—and when I say "we," I mean the Universal-Atlas—

Trial Examiner Norwood: Well, you paid that; did you?

The Witness: I was just going to explain.

Trial Examiner Norwood: Well, let us not have any further controversy about it. Just state whether you did.

The Witness: I see. The Universal-Atlas Company assumed the obligation of the old Atlas Company to pay its dues for the northeastern and southeastern territories that I have mentioned. It declined to pay dues for that additional year in the rest of the United States in which the Atlas Company operated.

35272 By Mr. Wooden:

Q. During that period, the Atlas mill continued getting whatever service the Institute provided.

A. No, sir.

Q. Why not? They were paying for it.

A. Well, as I say, I do not remember the exact wording in the by-laws, or whatever it was, but the Atlas Company went out of existence.

Q. I said the Atlas mills.

A. Well, the mills were owned by our company.

Q. Yes.

A. Eventually, and we received no report from The Cement Institute, we not being members. Now, I do not think that additional payment for that additional year carried with it the rights of membership during that year. The membership ceased, or would cease with any member leaving the membership, but in the case of Atlas, the Atlas was out of business, and the Universal-Atlas was not a member. The Universal-Atlas owned the old Atlas plant. We had no connection with The Cement Institute whatever.

Q. And, now, in regard to your practice when you make direct quotations on the same business that dealers are quoting on, do you make your quotations the same as you expect the dealers' quotations to be?

A. In the first place, I think it is seldom that we
35273 make a quotation on cement to be used in a class

of work that we ordinarily sell to dealers. Is such a thing should occur, that is, if some dealer should come in and bid on the class of work that we quote on directly, we have no knowledge of what the dealer is going to bid, and we bid on that work at the same price that we would bid to anybody else buying under the same conditions, without respect to any dealer.

Q. That means including dealers' discount or dealer's margin, or whatever you call it.

A. There is no dealer's discount now in our own company, and there is no dealer's margin so far as we know. I mean, we do not know what the dealer's margin is, unless he tell us.

Q. Well, he does tell you sometimes; does he not?

A. In no case that I know of have we learned from a dealer what his margin is, and then we, ourselves, bid our regular price, plus that margin.

Q. Are there not sections in which the dealer's margin is pretty well standardized, such as 10 cents up or 15 cents up?

A. I am not in a position to answer that. I have heard of dealers charging 15 cents up, or 10 cents up, but I do not know that that is a rule or custom in that territory, because other dealers buying other cements from other people may be charging different.

Q. Have you not bid 5 cents up in certain sections, or 10 cents up in certain sections because of that being
35274 the prevailing market?

A. Do you mean in the case of bids where dealers are expected to bid, too, or do you mean just any ordinary inquiry which we receive?

Q. No; where dealers and manufacturers are both invited to bid, or expected to bid.

A. As I said a while ago, I think if it is a class of business on which we are accustomed to sell dealers direct, we would not bid at all.

Q. Yes. Of course, I am not talking about that.

A. But if it is a class of work on which we do bid, we would bid the price that we would offer to anybody else—any other inquirer for a price, without regard to any dealer.

Q. Do you mean that you would bid the same price that you would charge the dealer?

A. Yes; the price which we would quote to a dealer.

Q. Then, you would be bidding at the dealer's price. How could he compete with you?

A. Because, as I said a while ago, Mr. Wooden, we do not bid on cement to be used in the class of work that we customarily sell to dealers. If it is a class of work on the cement for which we usually bid direct to consumers, we would bid without regard to any dealer, and the price that we would bid would be the price that we would offer to a dealer in the town, if we were quoting him.

35275 Q. Don't you sometimes bid along with the dealers on certain business?

A. I do not know of any such case.

Q. You never bid on any W.P.A. business direct along with dealers?

A. Of course, all over the country, there may be some dealers that bid on the same W.P.A. work that we may have bid on, but, ordinarily, my point is that we do not bid direct on W.P.A. work—on cement for W.P.A. work, because we sell that kind of work direct to dealers.

Q. And have you not sometimes taken business from W.P.A. and then had it filled by the dealer?

A. I do not recall such a case.

Q. Have you not bid on the same business that your dealers were bidding on?

A. If we have, it has been a case where—

Trial Examiner Norwood: Just state whether you know whether you have or not.

The Witness: I don't know, Judge.

Trial Examiner Norwood: Well, that is all he wants. Go on to something else.

The Witness: But I do have a dim recollection of an exhibit in this case—

Trial Examiner Norwood: No; never mind about that.

The Witness: All right.

35276 By Mr. Wooden:

Q. Now, with reference to your selling to railroads, my understanding is that if the railroad serves your mill, you then sell them f.o.b. cars at your mill; is that right?

A. Yes; f.o.b. cars on tracks.

Q. Yes.

A. At the mill.

Q. Yes. Yet I thought you said or claim that you did not sell the railroad f.o.b. mill. How do you explain that?

A. My way of expressing it was not that we quote a railroad f.o.b. mill. We quote railroad "f.o.b. cars delivered at your tracks" in the town where our mill is located.

Q. "F.o.b. mill" means loaded on cars, does it not?

A. Yes; I will not quibble with you if you want to describe it in that way, but you use it in such a way as to indicate that by preference we quote a railroad f.o.b. mill, and I put in this additional information, that shows that it can be described the other way just as well.

Q. I did not say anything about "preference."

A. I see.

Q. On a railroad that buys from you that is not located alongside your plant, you quote them f.o.b. junction, do you not?

A. We quote them f.o.b. cars delivered on their tracks at the nearest point to our mill that we can reach, 35277 which, of course, is a junction point—the nearest point freightwise.

Q. Do I understand you to express the opinion that the railroad had some advantage in getting a long haul of its own property in the form of cement purchased, over its own road?

A. If it purchases it at a price f.o.b. cars at destination.

Q. Well, it buys f.o.b. junction point, does it not, from your mill?

A. I think I stated in my testimony that in some instances we did quote railroads f.o.b. cars delivered at destination, and by "destination" I did not mean junction point. I mean some station on the line where they are going to build a depot, for instance.

Trial Examiner Norwood: The railroad buys it subject to the freight?

The Witness: Well, if we sold it f.o.b. destination, and they paid the bill, we would pay the freight to the railroad, just like we did on a shipment to John Jones at the same point.

Trial Examiner Norwood: Well, it amounts to the same thing, does it not, as paying, itself, the freight? It pays you the amount of the freight?

The Witness: That is right.

Mr. Hershberger: No; it amounts to just the contrary, I think.

The Witness: It means, Judge, that they earned
35278 the profit on the haul.

By Mr. Wooden:

Q. In such case does the railroad collect the freight for the account of the shipper?

A. I do not remember whether they have been shipped freight prepaid or freight collect, Mr. Wooden, but I, myself, do not see a bit of difference between the two.

Q. Do you see any advantage to a railroad in hauling its own property as far as it can over its own road?

A. Mr. Wooden, if the sale is f.o.b. destination, obviously it is to the advantage of the railroad if those goods are hauled over the railroad line, because the shipper of them pays the freight charges to the railroad, just as it would if the cement were bought by some private buyer, and not a railroad.

Q. In that case does the railroad collect the freight for account of the shipper?

A. As I said a while ago, I do not remember whether such a shipment is made freight prepaid or freight collect. I imagine the latter, but I repeat I do not see a bit of difference between the two.

Q. In selling the railroads, you use the same base prices and the same method of applying base prices that you use on other classes of business?

A. The quick answer to that is "Yes," although
35279 I would change your terminology somewhat and add some information to it. It isn't exactly the same is what I mean.

Q. When did Universal-Atlas Company begin the use of the five-day notice of advances in price?

A. I think a competitor adopted such a practice and announced—at least, announced to the trade that they had adopted such a practice, and we adopted that practice, although it has not been adhered to exactly the same in every instance.

Q. My question was, when you began.

A. Oh, I beg your pardon. It was, I think, some time before the N.R.A. Code.

Q. A short time before?

A. No, I think it was a considerable time before.

Q. How long before?

A. I don't remember.

Trial Examiner Norwood: Five minutes' recess.
(There was a short recess taken.)
Trial Examiner Norwood: Proceed.

By Mr. Wooden:

Q. Mr. Stone, has your company followed the practice of making prices in price declines effective retroactively five days?

A. Yes, sir.

Q. When did you begin to do that?

35280 A. We began doing it officially, if I may use that word, meaning that we had announced it, letting the trade know generally that that is what we do—I think when the Code went into effect, although it may possibly have been somewhat before that time, but, as a matter of practice, practical day-to-day basis, I think that adjustments were made covering recent shipments just prior to a price change, oh, for a long time back.

Q. Not on any consistent periods of a certain number of days?

A. I think it was usually, as I recall—it is a long time ago—it was about five days. It was usually on shipments made a few days before the price reduction was announced by—

Q. Shipments in transit?

A. Shipments in transit, or just arrived, maybe had arrived and not been unloaded, maybe it had just been unloaded a few days before the price decline took effect.

Q. Now, referring to Respondents' Exhibit 2491-A and B, being a price memorandum of January 23, 1931, that shows an adjustment in the Alpena, Mich., price to $1.55 from Michigan only, and $1.65 outside.

How did you find out that the price of $1.55 was effective only in the State of Michigan, and it was $1.65 outside?

35281 A. Because we found quotations at—in dealers' hands at prices which after we had deducted freight worked back to a constant figure of $1.55 at Alpena, in the case of Michigan destinations, and by the same price—by the same process which worked back to a constant figure of $1.65 for destinations outside of Michigan.

Q. You mean to say that you had field information as to all the destinations just inside Michigan and all those just outside Michiga.. so that you knew that was constant at every destination, those distances?

A. I think, Mr. Wooden, that requires a little explanation.

Q. That is what I thought.

A. In no case, or in almost no case do we, at the immediate time of a price change, find competitors' quotations at every destination. We find enough of them to give us the pretty firm belief that such and such a situation exists, and then right after the change has been made, in our day-to-day business, in the contacts of our salesmen with the trade, we confirm that information or that belief of ours more and more each day as it passes.

Q. Well, in this particular case, you may have been acting, then, on that assumption or that faith without knowing that every town outside of Michigan showed the $1.65 Alpena base?

A. It is possible at the immediate time of the price change, but within a very short time thereafter our belief is being confirmed more and more in each day in
35282 our contacts with the trade until we are finally, and when I say "finally" I mean within a comparatively short period, practically convinced that those are the quotations that our competitors make.

Q. But you make your changes before you are ultimately and finally convinced and have information as to all those points?

A. We do, but in the case of that individual exhibit, I call your attention to the fact that that is not a notice put out simultaneously with a price change. I haven't looked at it closely, but my impression is that it is a recapitulation at the start of the year of prices that we believed to be in effect—to have been in effect at that ime.

Q. Th[illegible] is right.

Can you tell me with reference to this same exhibit why the difference was shown for the Union Bridge base price, one price effecting the District of Columbia and Roslyn, and the other outside the District? What was the cause of that dual base at Union Bridge?

A. We have no control over Union Bridge mill, and why the owner of that mill took that action some time prior to January 23, 1931, the date of Exhibit 2491-A, I haven't the remotest idea.

Q. Wasn't it because of the establishment of the silo here by the Lone Star?

A. I don't remember when the silo was established;

this being nine years back, I just don't remember
35283 what the conditions were at that time.

Q. You have no idea as to why there was ever a dual base in effect at Union Bridge depending on whether it was for the District of Columbia and outside the District? There is a difference of 20 cents, depending on the territory to which it applied, and you don't know why it was?

A. I would be guessing at it.

Q. You sold in the District, didn't you?

A. Yes, sir; but there again we are operating in 37 States, and I don't know the details connected with that one little section of the territory almost 10 years back.

Q. Referring to Respondents' Exhibit 2497-B, will you please explain the statement there under Note A to the effect that there were three mills in the Birmingham district and the rates at some points—to some points differed, and that the lowest of the Boyles and North Birmingham rates should be used, but that the lower rates from Phoenixville do not apply? That last statement. Why didn't the lower rates from Phoenixville apply?

A. The only way that we could have that information is seeing quotations issued by the companies owning mills in the Birmingham district. We knew that those mills were quoting delivered prices which, after we had deducted freight rates, showed constant figures at two of the Birmingham mills and not the third one, the third one being Phoenixville.

Q. What mill was it in Phoenixville?

35284 A. I think that is the Alpha mill at Phoenixville.

Q. You don't know why the lower freight rate from Phoenixville should not have applied?

A. No, in that we do not own the Phoenixville mill and a competitor does.

Q. Referring to Respondents' Exhibit 2499-A, there is a reference made there to your company's letter to N. A. Kelly, dated May 27th, relating to a certain subject.

Mr. Hershberger: What is that exhibit, please?

Mr. Wooden: 2499-A.

By Mr. Wooden:

Q. I would like to ask you if you will produce the letter that is referred to.

A. I will consult Mr. Hershberger.

Mr. Hershberger: What is the letter, please, Mr. Wooden, just so I get it clearly?

Mr. Wooden: A letter to N. A. Kelly, dated May 27th, under the subject "arbitrary prices in vicinity of Washington, D. C."

Mr. Hershberger: May 27, 19—

Mr. Wooden: '32.

Mr. Hershberger: We will endeavor to find that. Does it indicate who it is from?

Mr. Wooden: This is Mr. Stone's price memorandum.

By Mr. Wooden:

35285 Q. Referring to Respondents' Exhibit 2500, the statement is made there that arbitrary delivered price at Oklahoma City has been eliminated.

What can you tell us about the arbitrary price at Oklahoma City?

A. From personal recollection, nothing, although I do have a hazy recollection of that fact. I can tell you how I believe it occurred.

Q. I would like to know the circumstances, as far as you can tell us.

A. We simply found quotations at Oklahoma City which indicated that the price formerly in effect there had been changed.

Q. Well, what I meant to ask and what I thought you were going to tell us was how it came about that there was an arbitrary delivered price at Oklahoma City.

A. I don't remember, but occasionally that does occur at given towns where there have been what I call cut prices prevalent.

Q. Do you know who established the arbitrary delivered price at Oklahoma City?

A. I do not, and that exhibit number—

Q. 2500?

A. Is dated?

Q. June 7, 1932.

A. I don't remember the details, at that time.

35286 Q. Isn't it a fact that the arbitrary delivered price was put in at Oklahoma City to meet the cut prices made there by the Dewey Company?

A. I don't remember the details of that case at all. I don't know whether it was Dewey or somebody else.

Q. You don't know who put it in?

A. No.

Q. Referring to Respondents' Exhibit 2502, and referring to the first page, can you tell me why the base prices

at Universal, Buffalo, Painesville, and Cleveland should not have continued to apply in the New England States in view of the fact that the prices at Alsen, Hudson, and Northampton were sharply increased at that time?

A. The Exhibit 2502-A is dated August 2, 1932. I do not remember fully all the details, but it is apparent to me, I think, that these so-called price bases at our mill at Universal and at Buffalo and at Painesville and at Cleveland were not being applied by the owners of those mills at distant points in the East where they were not accustomed to ship in the ordinary course of business.

Q. They had been theretofore applicable in that territory?

A. Apparently so, yes, but in the case of our Universal, Pa., mill, we would not go far East and quote the lowest price if we learned that competitors were not quoting prices that reflect back to the figures here from Buf-
35287 falo, Painesville, and Cleveland. That, it seems to me, is obvious.

Q. In other words, you wouldn't compete against yourself, for one thing, against your Hudson and Northampton mills?

A. Yes.

Q. But how about the Buffalo and Painesville mills? Do you know why their prices should not have been allowed to be effective in New England after this time as they had been before?

A. No; if those companies were not quoting at prices that would reflect back to those so-called price bases at their mills, why, there was no necessity of our going down, because there wasn't any price there to cause us to go down.

Q. How could you tell whether the Buffalo mill and the Painesville mill, for instance, were not allowing their base prices stated here to be effective in New England as theretofore?

A. May I give—I think I can make that much more clear by a short example: If the Painesville mill tomorrow started out quoting prices in Boston, Mass., why, we would learn it within just a few minutes. If that should continue a month, two months, three months—

Q. If they did do it, yes.

A. —we would undoubtedly meet it.

Q. If they don't do it, how are you going to find it?

A. Then, if they quit quoting, why, we would cer-
35288 tainly find it out immediately.

Q. How? By field information?

A. Yes, by field information. By field information, yes.

Trial Examiner Norwood: Do you mean that they would announce that they were not quoting any more there?

The Witness: No; if we did not find those prices there—you see, Judge, a moment ago I tried to draw this distinction, that at the time of price changes we do some guessing, but in a few days after that change, our guesses become beliefs, and are practically certainties.

By Mr. Wooden:

Q. But unless you picked up information at every point in New England you would not know whether at some point there these Buffalo and Painesville prices were still effective; would you?

A. As I say, Mr. Wooden, in our every-day contact with the trade, we would find that out.

Q. But at the time you made this change, you did not know what every point in New England was being quoted by Buffalo and Painesville mills?

A. In almost no case at the time we write a price memorandum do we know that we have accurate information in regard to every point, but we act on the best belief we have at that time, and later, as the days go by, our beliefs, as I say, become certainties. I don't know that we ever
35289 would know with absolute certainty about every point in the United States, but if we know it in the case of a given State that has 3,000 towns in it, and we learn about 2,000 of them, we, perhaps, guess at the others.

Q. But you did not know about 2,000 towns in the New England States before you made this statement here and the changes were made by these base mills at Buffalo and Painesville?

A. I have just tried to state that at the time we write the memorandum, we do not have information in regard to a lot of towns, say, 2,000 that you mentioned, but as time goes on, very rapidly we do learn in some 2,000 towns, if you want to use that figure, which I use as an illustration, an extreme illustration.

Q. After you have made a change in your base price and sent out the announcements to the trade, would you have any objection, then, to telling your competitors that you had made the change and sent out the announcement?

A. We have no occasion to do that. I think, if they asked

us, I do not know that we would object, because there is nothing secret about our prices.

Q. After you—

A. After we have made it.

Q. After you had announced it and sent the announcement out.

A. After we have announced it.

Q. You sometimes inquire from competitors after
35290 you pick up some of their quotations in the field, whether they have made the change indicated?

A. I do not think we do it in order to get the information. I have no doubt that if two cement men would meet on the street, and if one put in a price advance, there might be some remark made to him, or banter or otherwise made about it.

Q. Why is it not a quicker and more satisfactory method, and what is the objection to it; after the announcement has been made why can't you confirm it by inquiry of a competitor?

A. Well, we simply don't do it.

Q. And you have not done it?

A. What is that?

Q. You have not done it.

A. I don't recall any definite case of having done it.

Q. You have no objection to giving that information to a competitor after you have announced a change and sent out your announcements to the trade?

A. No; I think not, but I do not want to give the impression that that is a practice. If a lot of them began asking us, calling up, we would begin to wonder why they wanted the information. In fact, we might talk it over amongst ourselves, and say, "Here, what is going on? We better look into this."

Q. Referring to Respondents' Exhibit 2502-B, where it says, "Changes in arbitrary delivered prices at points in Connecticut, New Jersey, and New York," and men-
35291 tions 27 points adjacent to New York City, all points in Essex, Hudson, and Union Counties, and points in Bergen and Passaic Counties, on and south of a line drawn through Palisades Park, and several other towns, 123 other towns adjacent to New York City and 95 towns adjacent to New York City, in New York State, you do not mean to tell us that you had field information from all points that are referred to there, do you, on the date that you wrote it?

A. Well, this Exhibit 2502-A is dated August 2, 1932. May I read it?

Q. Yes.

A. (After examination of letter.) I do not remember the circumstances surrounding this exhibit, which is almost 8 years old.

Q. My question is: You do not mean to tell us that you had field information from customers at all of those points where these arbitrary prices apply; do you?

A. I do not know the details of the case, Mr. Wooden, that far back.

Q. Well, is it not a fact that you have received lists of arbitrary prices at times from competitors?

A. I have seen that stated in this case.

Q. Has not your company received them?

A. I have never received any, and I do not know, of my own knowledge, that we have received them. I assume that we have, from the testimony in the case.

35292 Q. Does not your Mr. Stark receive lists of arbitrary prices at various points from the Lehigh Company?

A. Whether he is the man who receives them, I do not know, but the Lehigh Company, as stated, I believe, in the record, if my memory serves me right, did let competitors have them if they asked for them.

Q. Well, it is a fact, is it not, that field information about one arbitrary point, destination point, would not be a bit of help about other destination points?

A. That is true, nor would one quotation which works under what you call the base point system be of any advantage to us with respect to a lot of other points. We would have to know many more than one point.

Q. Well, you would have to know a number of basing points, too?

A. No; we would have to know delivered price, from which we learn what the so-called basing points and basing-point prices are.

Q. Then, you would have to apply some basing points to other destinations to find out which one made the lowest combination?

A. We would have to figure the delivered price back to all mills that might serve that territory.

Q. Referring to Respondents' Exhibit 2506, it appears, from that that the Marquette Company had advanced prices

25 cents a barrel, effective June 29, 1933, and you
35293 found the quotations on June 30th, effective June
29th. It also appears that you and other companies did not meet the advance until some days later; is not that correct?

A. May I read Exhibit 2506?

Q. Yes.

A. (After examination of exhibit.) May I have the question again, please?

Q. Well, I was just calling your attention to it. I had not framed the question as yet.

A. Oh, excuse me.

Q. Do you see how the Marquette Company could make any sales at the advanced prices prior to the time that its competitors met the advance?

A. Of course, I know nothing about the experience of the Marquette Company in that respect. I assume that they could not. I know our company would have had difficulty in making sales under those circumstances.

Q. The action of the Marquette Company in June, 1933, and their action in July, 1932, when they advanced the price 40 cents a barrel, was a little bit out of character, was it not, with what the prior practice and the policy of the Marquette Company had been?

A. Of course, I don't know all of their policies, and I don't remember that far back, with respect to their prac-
tices, whether they had initiated, if you want to
35294 use that word, as used in this case, so many price advances. I think it might be worth while to call your attention to the fact that when you speak of a 40-cent price advance it would be well to mention from what to what.

Q. From 85 cents to $1.25.

A. If the advance is from a low point, it is quite different from an advance from a comparatively high point.

Q. As a matter of fact, the Marquette Company, beginning in 1932, and again in 1933, as shown by this exhibit, instead of being a price cutter, was becoming a price leader, was it not?

A. I find it difficult to characterize the actions of the Marquette Company that far back, in order to interpret their thoughts.

Q. I am asking you as a man familiar with the cement business.

A. I can say this, that one company may announce a price change and still be a price cutter, if it wishes to be. My recollection of those times is that they had been through such a terrible experience in the cement industry, and everybody had lost so much money, when the Marquette Company made that announcement others were only too glad to follow, because we had been on starvation basis for so long.

Q. And in 1933 you got the price back up to what it was in 1929; did you not?

A. I don't remember the 1933 figure and the 1929 figure.

35295 Q. All right. Can you tell me with reference to this same exhibit, No. 2506, who eliminated the bases at Ada and Dewey, Okla.?

A. Unless I can find the information in the exhibit, No. 2506, I do not know, but I can say that that was quite an extensive price change at that time, covering a wide area. It was shortly before the—

Q. The N.R.A. Code?

A. —the N.R.A. Code, which, I believe, at that time indicated a tendency towards higher wages and higher expenses in manufacturing, and we undoubtedly gave considerable thought to many, many factors at that time, and we got together all the information we could and adjusted prices to the best of our ability to what we thought they ought to be from our viewpoint and also from a competitive viewpoint.

Q. I am asking you about Ada and Dewey, Okla. Who put in the bases at Ada and Dewey, Okla.?

A. I don't remember.

Q. You don't remember who put them in or who took them out?

A. No.

Q. Don't you know that they were not put in by companies that had mills located at those points?

A. Ada, and what is the other point?

Q. Dewey.

A. I think I have a recollection that Ada was 35296 not made a so-called base point by the owner of the mill. As to Dewey, I don't remember, and I don't remember who put in the base, using your language, at Ada.

Q. Now, referring to Exhibit 2508, dated March 13,

1935, was that the Marquette Company that was again making the advance (handing the exhibit to witness)?

A. Since Exhibit 2508 is dated the 13th of March, 1935, while the Code was effective, and since the exhibit states that certain delivered prices were filed with the Code Authority, and the two mills listed in the early part of the exhibit are mills owned by Marquette Company, I assume that Marquette was the company that made the filing.

Q. Made the initial filing?

A. Made the filing with the Code Authority.

Q. I say, made the initial filing.

A. Yes.

Q. Did you continue checking through field information during the N. R. A. Code period of price filing as well as you had previously done?

A. Yes, sir.

Q. In other words, no difference in degree or kind?

A. There may have been some difference in degree. It was not by instruction to the sales force. We didn't say to them, "Discontinue this part of your duties during the life of N.R.A."

Q. Now, a number of these exhibits, your price memoranda, indicate that oral instructions were sent out prior to the date of the price memoranda, themselves.

A. Yes, sir. I don't know the particular ones you have in mind, but that could readily be the case.

Q. In other words, the price memoranda may have been just made as a record of action previously taken under oral instruction?

A. It was confirmation of oral instructions.

Q. Referring to Exhibit 2502 again, that shows the elimination of base prices, mill base prices, at Glens Falls and Howes Cave and some other points.

How can you tell from field information, from customers, that a base price has been eliminated? In other words, isn't there just an absence of the quotations that you are able to pick up in that case?

A. Why, no, sir. At the time of a price change, Mr. Wooden, we pick up a reasonable number of quotations or get the reasonable amount of information from the trade as to prices at their respective destinations quoted to them by other present manufacturers. Now, we will take one individual quotation, and it shows a price, we will say, of $2.75.

Q. Of course, if that is the Howes Cave mill, for instance, quotation, then you can ascertain it.

A. No, if it is anybody's quotation, anybody's quotation.

Q. How could you tell from anybody else's quo-
35298 tation except Howes Cave that the Howes Cave base had been eliminated?

A. I was attempting to describe that.

Q. All right.

The Witness: May I have the last word or two?

(Record read.)

A. (Continuing.) That the customer has received from some cement manufacturer f.o.b. the customer's destination, f.o.b. cars customer's destination, we immediately proceed to deduct from $2.75 the freight rates from all mills that might reasonably be expected to serve that destination, and note that I say "all mills." Then we take a number of other quotations from any—regardless from what company it is received, and we go through the same process, and if we find that many of those quotations figure back to a constant figure at mill A, we assume for the time being that mill A is what you call a base mill at the price that is derived from the quotations.

Then if other quotations show a constant figure at mill B, after we have deducted the freight, and so on, there may be two or three or four or five mills that we conclude are what you call base mills, and if Glens Falls, in your instant question, is not one of them, why, regardless of—and the delivered prices are lower than the prices theretofore in effect at the points in question that have figured back to a certain figure at Glens Falls, why, we
don't care what the Glens Falls Company, itself, is
35299 doing; we know that these competitors are quoting a price lower than the price formerly working back to the Glens Falls so-called price base.

Now, is that clear?

Q. I think it is. I think it is. Just a slight development of the point that we have had up many times, an amplification of it.

How many field quotations do you consider necessary to enable you to determine that a change has been made?

A. It depends on the locality in which we find them; that is, I mean by that large locality or small locality, and the number of mills roundabout, and all that sort of thing.

We have no set rule. For instance, if we should find tomorrow morning four quotations in the City of St. Louis, we would immediately get in touch with our salesmen outside of St. Louis, around about, within that vicinity, and tell them about it, and say, "Are you able to find any in your territory?" "No."

As a matter of fact, the salesmen ought to report to us without our asking, but in our anxiety we would get in touch with the salesmen, if we didn't hear from them first. Well, that would establish, at least, temporarily, in our minds, the fact that there was no change outside of St. Louis. If we find three or four points—

Trial Examiner Norwood: Does the Counsel wish to develop anything different on this cross-examination
35300 than what we have had about fifty times?

Mr. Wooden: Why, very little different, I would say, Your Honor. I was just about through.

Trial Examiner Norwood: Yes. Go ahead.

Mr. Wooden: With the witness.

The Witness: Shall I continue the answer to that one question?

Trial Examiner Norwood: I think you have answered it.

By Mr. Wooden:

Q. Do I understand, Mr. Stone, that you have read and studied the record in this case, the testimony of other witnesses who preceded you?

A. I don't know that I would use the word "studied," Mr. Wooden. I found it quite a task to read it in such a fashion as I have read some 35,000 pages.

Q. But you have read it?

A. I am not letter perfect in it by any means, and some parts I fear I skipped.

Q. But you have attempted to read it?

A. Being in the cement business, why, naturally, I am interested in such a lawsuit.

Q. And I understand you have read it without regard to just how carefully you read it?

A. Yes, sir; but I have read it in the way I de-
35301 scribed in the former answer.

Mr. Wooden: I have nothing further.

M. A. BERNS, being called as a witness for the petitioners, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Hershberger.

35302 I am publicity manager for Universal Atlas Cement Company. I have held that position since about 1920 and I have been in that department since 1913 with the Universal Atlas Cement Company and their predecessor, Universal Portland Cement Company, I am not testifying that the Universal Portland Cement Company was a predecessor of the Universal Atlas Company. My business location is and has been in New York since November 1938. Prior to that time I was in Chicago.

Q. Just give us briefly the type of duties which you customarily exercise in your employment.

A. Well, in our department we handle the advertising, both paid space in the different magazines and various kinds of direct mail and other matters of that kind,
35303 plus some miscellaneous duties, including some analyses or assigned duties from a superior.

Q. Do you hold yourself available for special work required by the president or vice-president of the company in connection with gathering together various types of material?

A. Yes.

Q. And you use your department in that sort of activity?

A. Yes.

Mr. Hershberger: Mark that for identification, please.

(A document was marked for identification "Respondents' Exhibit 2526.")

By Mr. Hershberger:

Q. I show you Respondents' Exhibit, for identification, No. 2526, and ask you to state whether that was prepared in your department under your supervision, and, if so, what it is.

A. It was prepared under my supervision, and it purports to be or is a list of delivered prices of Portland cement at 14 different destinations for the period from January 1, 1926, to July 11, 1938, showing the dates on which different price changes occurred at those destinations.

Q. You stated that those are delivered prices; did you?
A. That is right.
Q. How did you happen to use the 14 particular cities that are shown on that tabulation?
35304 A. Well, they were taken as representative for a rather large area.
Q. An area within which your company does business?
A. Yes.
Q. When did you make this tabulation?
A. In the summer of 1938, the last date here being July 11, 1938.
Q. And opposite the last date the figures shown are the prices in effect on that date, I assume; is that correct?
A. That is right.
Mr. Hershberger: I will offer that exhibit for the record (handing the document to Commission's Counsel).
The Witness: Price making does not come under the publicity manager. Price tabulating will come in if I am asked to do it, like anything else.
35305 Mr. MacIntyre: I would like to ask the witness a question or voir dire, if I may.
Trial Examiner Norwood: Go ahead.

Examination on Voir Dire by Mr. MacIntyre.

Q. Mr. Berns, can you tell to what extent the so-called delivered prices that are listed on Respondents' Exhibit 2526 reflect only changes in freight factors that were made effective by the Interstate Commerce Commission after application by the carriers involved?
A. They reflect all price changes at destination whether due to changes because of competition or because of freight or whatever it might be. In other words, they are the prices we were quoting to dealers at those destinations at the dates shown.
Q. You think that that is an explanation to whatever answer you feel that you can give me to my question—
Mr. MacIntyre: Will you please read the question back to him?
(Question read.)
The Witness: I thought I answered that. You said "reflect only changes." It reflects those—

By Mr. MacIntyre:

Q. Can you tell us as to what extent it reflects only changes in freight factors thus brought about? Can
35306 you tell us to what extent?

A. No, I cannot. It includes those and any others.

Q. That is what I understand.

Now, I would like to ask you from what sources did you secure the information that you did place on this tabulation?

A. From the records in our company.

Q. What is the nature of the records to which you went for that information?

A. The records in the sales department as furnished by the offices that have these particular territories under their jurisdiction.

Q. What was the nature of the information that they furnished? In what form?

A. As inter-office memoranda or information to the general sales office.

Q. You mean in the form of letters that they wrote to the general sales office?

A. Yes.

Q. And they were written by the various district sales manager to the general sales manager?

A. That is right.

Q. When were they written?

A. Whenever a price change went into effect, especially at these particular destinations, or in answer to a
35307 letter from the sales office regarding the price in effect of when a change became effective, if it occurred prior to the letter.

Q. Mr. Berns, isn't it a fact that the information that you have put onto this tabulation was taken from letters that the district sales managers of the Universal-Atlas Company wrote to the general sales manager in response to a request that he made upon them for memoranda of that type just previous to your putting it on here?

A. In many cases that would be true, but not in all cases because we were keeping a record of prices at these particular destinations.

Q. Well, you say in most cases. What percent of the cases would that be true, that is, the proposition that I just stated?

A. Among other things, these particular destination prices are prices which we were requested by the Bureau of Labor Statistics to furnish to them, it being their selection of information they wanted from us, so we made it our business to get this constantly or regularly from our district offices.

Q. Going back to this statement that you just made about in most cases, you said the proposition I stated was true.

Now, I will ask you in that connection, what was the date of the request that the sales manager made for the information where that is true in most cases?

A. I couldn't give that specifically because we
35308 had been reporting this information for prices at these destinations for a considerable period, and, therefore, we would constantly have that information from our district offices covering those destinations.

Q. But only in the form of these memoranda?

A. That is right.

Q. In the form of letters, more or less, from the district sales manager to the general sales manager?

A. That is right.

Q. Can you tell us from what records or the nature of the records from which they took their information and in which they recapitulated into the memorandum?

A. Well, they would have a record, whatever method of record keeping they have in each office, as to what the price would be, and when the price changed showing a notation merely that the price is a certain amount, and then when it changes they would indicate that on their record, and then they would transmit that information to the general office.

Q. Do you know of the existence in their offices of any record of delivered prices to which they could go; that is, and determine what delivered prices that they had quoted on any particular day other than the basing-point prices and freight rate books?

A. I couldn't say what any particular office might have in the nature of its own office records in the branch office.

35309 Q. Do you know of any records other than those I have described that they could have gone to for this information?

A. Not to my personal knowledge as to what they have in the branch office.

Mr. MacIntyre: If Your Honor please, in the light of the developments on voir dire, we will have to object to the offer as incompetent, irrelevant, and immaterial.

Mr. Hershberger: I don't see, Your Honor, how it can be incompetent, irrelevant, and immaterial. It goes very much to the heart of the subject we are in and there has already been introduced into the record exhibits of tabulations of base prices. I think it fits in very well with the study to know what the prices delivered are at certain specific locations.

Now, this witness has done the best that can be done in the way of preparing tabulations. It is done in the same way that the Department of Labor statistics accepts figures, and, certainly, there is nothing that can be inaccurate or inappropriate about it. It is the best kind of a thing that can be produced along that line.

Trial Examiner Norwood: We have been receiving these tabulations on the express condition that the supporting data were available to the other side for checking. This witness seems to have done nothing but tabulate certain information which has been furnished him 35310 by others.

Mr. Hershberger: We would have no—

Trial Examiner Norwood: It seems rather unsatisfactory that he can't tell us about this. If it is important enough to put in it is important enough to have the details as to what price changes resulted from changes in freight, what price changes were considered as base prices, and so on.

Mr. Hershberger: That is not the purpose of it, of course, Your Honor. The purpose of it is to show what the actual prices are. It goes to show the extent that the prices delivered fluctuate or vary, or, on the contrary, may be rigid for a period of time.

Trial Examiner Norwood: Can you put this in a more satisfactory form than that?

Mr. Hershberger: I suppose we could bring in a great mass of material, consisting of invoices in each of these locations, that had been sent to numerous customers, but you would have a bulk material there that would result in this tabulation when it is through. We certainly would

have no objection to any check that Counsel for the Commission may want to make as to the accuracy of this.

Trial Examiner Norwood: Could not this be put in through some official conversant with those prices and the facts that it contains?

35311 Mr. Hershberger: There is no official of or individual in the company that could state the prices at these various 14 cities, probably, on any one day, and certainly not over a period of 12 years, as this tabulation purports to cover. It would be impossible.

Trial Examiner Norwood: I think the objection should be sustained.

35312 Mr. Hershberger: May I make a statement, Your Honor?

Trial Examiner Norwood: Yes.

Mr. Hershberger: I would like to ask you to withhold your ruling on that document, Exhibit, for identification, No. 2526, until later in the afternoon, as I expect to present another witness that may be able to clear up that matter.

Trial Examiner Norwood: Yes. We will pass it for the time being, then.

Direct Examination (Continued).

Mr. Hershberger: Will you mark this for identification, please.

(The document was marked for identification "Respondents' Exhibit 2527.")

By Mr. Hershberger:

Q. Mr. Berns, you testified this morning that

35313 you were the publicity manager of Universal-Atlas Cement Company, did you not?

A. That is right.

Q. Will you state whether that publicity managership position which you hold is a part of the sales department of the Universal-Atlas Cement Company?

A. I am a part of the sales department, and report directly to the vice-president in charge of sales.

Q. Showing you Respondents' Exhibit, for identification, No. 2527, will you state whether this exhibit was prepared by you and what the exhibit is?

A. This statement was prepared by me, and it is a comparison of index numbers of all commodities, building

materials, and Portland Cement, from Bureau of Labor Statistics data and from Bureau of Mines data.

Q. Are the first eight columns on that exhibit from the Bureau of Labor statistics?

A. That is right.

Q. And the figures in column 9 are from the Bureau of Mines' figures?

A. They are based on Bureau of Mines' figures.

Q. And the exhibit covers what years?

A. 1913 to 1938, inclusive.

Q. Are these index numbers?

A. Yes.

35314 Q. On what base?

A. On the base of 1913 equals 100.

Q. Will you refer to it again and see if that answer is correct?

A. No. I stand corrected. On the basis of 1926 equals 100.

Q. Does the exhibit show the source of the material which these figures were taken from?

A. Yes; it does.

Q. Where does it show that?

A. In the typewritten data to the right of the tabular data.

Q. And you have that material available, have you?

A. Yes.

Q. For checking purposes?

A. Yes; I have.

Q. You have that with you?

A. Yes.

Mr. Hershberger: I offer that exhibit for the record (handing the document to Counsel for the Commission).

Mr. MacIntyre: I would like to ask a question on that.

Trial Examiner Norwood: You may.

Examination on Voir Dire by Mr. MacIntyre.

Q. Mr. Berns, when did you prepare this?

A. The date is on the bottom of the sheet, Mr.

35315 MacIntyre—a couple of weeks ago.

Q. For use in this case?

A. Beg pardon?

Q. For use in this case?

A. Yes.

Mr. MacIntyre: We object to the offer as irrelevant and immaterial. It does not prove or disprove any allegation as to the existence of a combination, as charged in this case.

Trial Examiner Norwood: What is the purpose of it?

Mr. Hershberger: The purpose of this, Your Honor, is to make a comparison of prices of cement on an index basis with the prices of other commodities. These figures are all taken from Government bulletins, which we have here available now for checking by Counsel for the Commission. It is merely a matter of tabulating material that is in Government bulletins or Government documents, and it shows the comparative basis of cement prices with the other commodities that are listed. You will notice that column 7 is headed, "Portland Cement," and column 9 is headed the same thing, "Portland Cement." The reason for those two columns is that column 7, as are all of the other columns, 1 to 8, inclusive, is taken from bulletins or from documents issued by the Bureau of Labor statistics, whereas column 9 is based on documents from
35316 the Bureau of Mines. The two, that is to say, the Bureau of Mines and the Bureau of Labor statistics, have somewhat different methods of handling their reports, which produce a somewhat different source of figures with reference to cement; so we give it both ways.

This relates to the question of rigidity of cement prices as compared with the prices of other products of building materials, and it seems to me that it goes very directly to one of the issues, and is a very important study for the Commission to have in considering this case.

Mr. MacIntyre: We again state that we cannot see that it has any relation whatever to any change in the complaint or pieces of proof.

Trial Examiner Norwood: It would go to the reasonableness of prices, would it not?

Mr. Hershberger: It goes to the allegation in the complaint that prices are too high. There are several allegations in the complaint, that by reason of methods alleged to have been used, prices are higher than they should be. There is that specific allegation in the complaint. I think I can pick it out for Your Honor, if you want me to do so. In the complaint one of the facts alleged is that prices are too high. I will find that particular paragraph.

35317 At the end of paragraph (g) of the complaint, under paragraph 8, after stating a lot of things, it summarizes by saying:

"Thus the system results in greater cost to the public."

"Cost", of course, meaning in the sense that prices that the public pays are greater.

It seems to me that it goes very directly to the issues in the case.

Trial Examiner Norwood: It does not say greater cost as compared with the cost of other building materials, but it goes to whether or not it is a greater cost of cement as compared with cement sold under other conditions. I think that that is going to open up the record.

Mr. Hershberger: Well, this particular subject has been opened up by economic testimony, Your Honor, and I want to protest as strenuously as I can, for the purpose of the record, against being precluded from introducing any evidence along lines that has already been presented by Federal Trade Commission Counsel.

Trial Examiner Norwood: Is there any evidence as to the reasonableness of cost?

Mr. Hershberger: I contend that there has been testimony from economists that have been called by the Commission that goes directly to the issue that prices
35318 are too high.

Mr. MacIntyre: It is not my recollection that there is even economic testimony on the point to which this goes.

Trial Examiner Norwood: I do not think we should prolong this investigation to include comparative studies of prices of cement with other building materials.

Mr. Hershberger: If Counsel for the Commission are willing to stipulate that rigidity of prices is not involved in this case, and that there will be no contention that there has been an illegal rigidity of prices, and if Counsel are further willing to stipulate that there will be no contention that prices of cement are unreasonably high by reason of the method of conducting the cement business, which have been shown in this case, on that condition I am willing to withdraw the offer.

Mr. Wooden: Your Honor, as far as rigidity is concerned, there is evidence of rigidity in the record, and we put it there because I think an inference logically can be drawn from it as to the reasons for such rigidity. This

proffered exhibit does not go to the question of rigidity at all. I will say that the question of whether cement prices are high or low by comparison with lumber and steel and brick and other substitute materials is not an issue in the case.

35319 Mr. Hershberger: Well, that isn't what I asked, Your Honor. We are endeavoring to prove that that comparison of cement prices with other products is proper. We contend that it is proper to make that comparison, to show that they are not unduly high. Now, of course, that—

Trial Examiner Norwood: That goes to the reasonableness of the price.

Mr. Hershberger: It goes to reasonableness of the price. We certainly do contend that it should be shown, and we have a right to show whether our prices are unduly high compared with other products to determine reasonableness of price. The mere fact—

Mr. Wooden: That a combination be determined by other evidence than the question of the reasonableness of price may have some relation to that if Respondents are willing to admit that there is a combination but that the prices fixed by the combination are reasonable, that is one question, but to try to prove the non-existence or the existence of a combination by the price level itself, and comparing that price level with the price level of other commodities—I certainly contend that is irrelevant and immaterial.

Trial Examiner Norwood: If the Commission has produced any evidence here to show unreasonably high

35320 prices as a symptom of monopoly; in other words, approaching the subject indefinitely, then I think this should be received to meet it.

Mr. Hershberger: Absolutely.

Trial Examiner Norwood: But I don't think that there is anything factual in the evidence to show unreasonableness of prices, and we had something touching on that subject in connection with the T. V. A., and it was all stricken.

Mr. Hershberger: That was with relation to costs, Your Honor.

Mr. Wooden: Costs and profits, that is all.

Trial Examiner Norwood: The reasonableness of the price was involved.

Mr. Hershberger: Let me ask this in answer to what you said a moment ago.

Trial Examiner Norwood: Yes.

Mr. Hershberger: Mr. Wooden has just indicated that he is not willing to stipulate that there is no evidence in the record to that point, and, furthermore, I want to say this: That Counsel for the Respondents, certainly Counsel for the Universal-Atlas Cement Company, should not be prevented from introducing a new type of evidence merely because that kind of evidence hasn't been produced by the Commission in its case. They have put on
35321 their case, and they have put in a great many types of different proof, material, and we propose to put on, if we are permitted to do so, the various types of material that we shall use in our arguments as evidence rebutting the various allegations that are made. Now, this is a collection of material, it seems to me, that goes directly to the question of reasonableness of price. It is charged in the complaint that our prices are too high, and I think it should be permitted.

Trial Examiner Norwood: I think that the relevancy of this would depend upon the contentions of the Commission and what testimony they have heretofore put in.

Mr. Hershberger: Supposing the Commission takes the position that there is evidence in the record on these phases?

Trial Examiner Norwood: You can point to my rejection of this proffer here and your exception to it.

Mr. Hershberger: Of course, that brings us back again and all over the ground again, and wouldn't it be simpler to take it in and study it and use it for what ever it was worth?

Trial Examiner Norwood: It is marked and identified. I think that they could take it up higher up just as is if they decide I am wrong. I will sustain the objection. I think this would broaden the inquiry far too much.

35322 Mr. Hershberger: Mark these, for identification, please.

(The documents were marked for identification "Respondents' Exhibits 2528 and 2529.")

By Mr. Hershberger:

Q. Let me ask just a few questions about this 2527, for identification, please.

Does this exhibit, for identification, Mr. Berns, 2527,

show the relative relation of the prices of cement during each year from the years 1913 to 1938, inclusive, as compared with all commodities?

A. Yes, sir.

Q. And as compared with all building materials?

A. Yes, sir.

Q. And as compared with the prices of structural steel?

A. Yes, sir.

Q. And as compared with the prices of brick and tile?

A. Yes, sir.

Q. And as compared with the prices of lumber?

A. Yes, sir.

Q. And as compared with the price of paint and paint materials?

A. Yes, sir.

Q. And as compared with the prices of other building materials?

35323 A. Yes, sir.

Q. And is the source of all the information on Exhibit 2527, for identification, bulletins published by the United States Government, various departments?

A. That is right.

Mr. Wooden: Incidentally, I would like to call Your Honor's attention to the fact that some of the commodities included in the statement, and in the proffered exhibit, are themselves sold on a somewhat similar arrangement of delivered prices as we have in this case.

Mr. Hershberger: I object to that. There is no proof in the record on that.

Mr. Wooden: And some are not. That is a matter of common knowledge.

Mr. Hershberger: There is no proof to that effect. I object to that.

Trial Examiner Norwood: I have already taken my action on it, but I did consider the fact that it might open up so many questions like that and open up a new issue here. We have been going on here for over two years and we have to—

Mr. Hershberger: I want to move that the last statement of Mr. Wooden be stricken on the ground that there is no evidence to support it; that is, his statement to the effect that other commodities mentioned in that document

35324 are sold on the basis the same as cement. I think there is no proof of that.

Trial Examiner Norwood: I see no reason for striking it. I haven't considered it in any way in my ruling.

It is not evidence; it is merely Counsel's statement.

By Mr. Hershberger:

Q. I show you, Mr. Berns, Respondents' Exhibit, for identification, No. 2528, and ask you to state whether you prepared that, and, if so, what it is?

A. I prepared this, and it is a graphical representation of a comparison of index numbers with 1926 price equals 100 for an index number of building materials, including various kinds.

Q. Will you state what kinds?

A. Structural steel, brick and tile, lumber, paint and paint materials, Portland cement, and other building materials.

Q. What years does it cover?

A. For 1913 to 1940—1938, inclusive.

Q. Is that a graph putting in graphic form the figures which appear on the tabulation, Respondents' Exhibit, for identification, No. 2527?

A. That is right.

Q. But it doesn't include all of the materials shown on Exhibit 2527, does it?

A. No, sir.

Q. And which does it leave off?

35325 A. It leaves off all commodities.

Q. And does it leave off all building materials?

A. Yes, sir.

Q. Now, showing you—

A. It leaves off the item "All building materials," but it covers various building materials and the balance thereof which the Bureau of Labor Statistics calls "other building materials."

Q. In other words, it is a graph of the part of the material of several of the columns shown on Exhibit, for identification, 2527?

A. That is right.

Q. Showing you Respondents' Exhibit, for identification, No. 2529, state whether you prepared that and what it is.

A. I prepared this, and this is a similar graph comparing index numbers of all commodities, of building materials and of Portland cement.

Q. Is that exhibit a graph of some of the information that is contained on Respondents' Exhibit, for identification, 2527?

A. That is right.

Q. Now, state to us why you made two graphs, one being numbered 2528, for identification, and one 2529, for identification, instead of making one graph?

A. Well, all the data on Respondents' Exhibit, for identification, 2527, when put into graph form using
35326 the same basis—axis—make so many lines that it is confusing. Therefore, that data—from that data were divided—

Q. You mean by "that," Exhibit 2527?

A. That is right. —were divided into two exhibits, one of which is Respondents' Exhibit 2528, for identification, which includes the various individual building materials and the group "other building materials" for comparison with Portland cement; and Respondents' Exhibit 2529, for identification, compares all commodities.

Q. You mean the same as is headed in 2527, "All Commodities"?

A. That is right. The terminology is the same on all three exhibits, and 2529 compares all commodities and building materials with Portland cement.

Q. Thank you.

Now, these classifications or the heads of these columns that we have referred to on Exhibit 2527, for identification, are the same headings used by the Bureau of Labor Statistics; are they not?

A. For columns 1 to 8, inclusive, but not column 9.

Q. Column 9 is the classification that is based upon your Bureau of Mines' figures, as you have stated?

A. That is right.

Mr. Hershberger: I also offer, Your Honor, for the record, Respondents' Exhibits for identification, 2528 and
2529, graph material supplementing Respondents'
35327 Exhibit, for identification, 2527.

Trial Examiner Norwood: Well, they cover the same material as the one just rejected.

Mr. MacIntyre: It is our understanding that it covers the same material except that it is in graph form instead of tabular form, and the objection to them is the same as to 2527.

Trial Examiner Norwood: Objection sustained. Coun-

sel may present them to the Commission and argue their relevancy and materiality.

Mr. Hershberger: Will you mark this for identification, please?

(The document was marked for identification "Respondents' Exhibit 2530.")

By Mr. Hershberger:

Q. Mr. Berns, I show you Respondents' Exhibit, for identification, No. 2530, and ask you to state whether that was prepared by you, and, if so, what it is.

A. This was prepared by me, and it is a tabulation showing capacity and production; that is, Portland cement manufacturing capacity and clinker production of all companies, and of the Universal-Atlas Company, for the years 1925 to 1938, inclusive divided by this Bureau of Mines district, districts from 1 to 9, inclusive, with a total for districts 1 to 9, inclusive.

Q. Why don't you add district No. 10? There is 35328 a district No. 10, is there not?

A. We exclude districts 10, 11, and 12, which are west of the Rocky Mountains, as we have no plants in those districts.

Q. Does this tabulation include figures of all of the districts in which your company operates, has manufacturing facilities?

A. That is right.

Q. What does this particular exhibit purport to show? What comparison does it make?

A. It shows the estimated capacity as given by the United States Bureau of Mines. For example, for district 1, and then also shows the Universal-Atlas capacity in the same district, and then shows the percentage that Universal-Atlas is to the total. It similarly shows the clinker production for all companies, for Universal-Atlas, and the Universal-Atlas percentage by years by districts.

Q. And that covers the years 1925 to 1938, inclusive?

A. That is right.

Q. Does the exhibit indicate on its face the source of the material?

A. Yes, it does.

Mr. Hershberger: I offer that exhibit for the record (handing the document to Counsel for the Commission).

Mr. MacIntyre: While we feel that the offer duplicates

to some degree some material already in the record,
35329 there is no objection to it, Your Honor.

Trial Examiner Norwood: It is received as marked.

(RESP. EX. 2530 was offered and received in evidence.)

By Mr. Hershberger:

Q. Mr. Berns, I show you Respondents' Exhibit, for identification, No. 2531, and ask you to state whether you prepared it, and, if so, what it is.

A. I prepared this, and it, namely, No. 2531, is a graphical representation of the tabular material on Respondents' Exhibit 2530, for identification.

Q. And this, again, is divided into districts; is it?

A. It is divided into districts and by years.

Q. That is, Bureau of Mines' districts.

A. That is right.

Q. Does this tabulation indicate by one type of line the varying percentages of capacity, and by a different type of line the varying percentages of production?

A. The solid line indicates the Universal-Atlas
35330 percentage of capacity, and the dotted line indicates the Universal-Atlas percentage of production.

Mr. Hershberger: I offer this as supplementary to the study which has been received as Respondents' Exhibit 2530.

Mr. MacIntyre: I see no real need for this in the record, but there is no objection to it.

Trial Examiner Norwood: It is received as marked.

(RESP. EX. 2531 was offered and received in evidence.)

By Mr. Hershberger:

Q. Mr. Berns, I show you Respondents' Exhibit, for identification, 2532, and ask you whether that was prepared by you; if so, what it is, and from what sources it was made.

A. Respondents' Exhibit No. 2532, for identification, was prepared by me, and it is a tabulation showing the cost of cement and of all materials, compared with contract cost of various types of federally-financed projects, for various periods, for which run from July, 1933, to June, 1937.

Trial Examiner Norwood: In other words, that
35331 is the same as 2527?

Mr. Hershberger: No.

Trial Examiner Norwood: 2527 and 2528 and 2529, except that it covers the Government use—

Mr. Hershberger: No.

The Witness: Are you asking me?

Trial Examiner Norwood: I was asking Mr. Hershberger.

Mr. Hershberger: No relation at all, Your Honor. No; there is no relation between those at all, Your Honor.

Trial Examiner Norwood: Well, go ahead.

Mr. Hershberger: This one, No. 2527, Your Honor, which was included, was the index numbers, showing the relative cost of cement with various types of building materials.

Trial Examiner Norwood: Yes; I should have said 2526.

Mr. Hershberger: No; 2527.

Trial Examiner Norwood: Well, go ahead.

Mr. Hershberger: Oh, I misunderstood your question. No; it is not that, either, Your Honor. Respondents' Exhibit No. 2526, which was excluded, is a tabulation of actual destination prices.

Trial Examiner Norwood: I see.

35332 Mr. Hershberger: It has nothing to do with the comparison of the cost of cement in building projects.

Trial Examiner Norwood: Go ahead.

By Mr. Hershberger:

Q. What was the source of the material that you put on that tabulation, Mr. Berns?

A. All of it is material or data from the Bureau of Labor Statistics, except some figures in percentages that are derived from those dollar figures of the Bureau of Labor.

Q. In other words, the percentage figures being calculations that you made?

A. That is right.

Q. Pure arithmetical calculations?

A. That is right.

Mr. Hershberger: I offer that exhibit for the record (handing the document to Counsel for the Commission).

Mr. MacIntyre: We object to the offer. As I understand it, it merely shows the percent of the total cost on this building, as well as other federal buildings, represented by Portland cement; that is, the cost of Portland

cement. It has no relation to any of the issues in the case. It is irrelevant and immaterial.

Trial Examiner Norwood: What does it go to show?

Mr. Hershberger: It just shows what Mr. MacIntyre indicated it shows. It shows the percentage of the
35333 cost of federal projects, which is applied to cement, as compared with the total cost of those same projects. We contend that it is material and relevant in this case, because there have been many statements during the trial of this case by counsel, to the effect that the prices of cement are unreasonably high, and that if a different method of selling cement were employed, it would increase the use of cement. Our purpose of offering this into evidence is to show that the cost of cement in these various projects is so slight that any reduction which could reasonably be made, or which could possibly be made, would have little or no bearing on the volume of the consumption of cement; and, further, for the factual development of what is the amount of cement that is used in various projects. That is an additional purpose of it, Your Honor.

Trial Examiner Norwood: Well, does that come directly under any issue?

Mr. Hershberger: In addition to that, of course, it shows the volume of cement purchased by the Federal Government on the projects referred to. There have been many statements throughout this case that go to the question of volume of cement that is consumed by the Federal Government and that go to the question of how important those cement costs are in relation to total costs.
35334 Now, there certainly has been a great deal of testimony along that line, and many allegations by counsel in their statements, and it seems to me that it is material.

Trial Examiner Norwood: I do not see that there is any issue that this comes directly under. If some reference has been made to it in an exhibit introduced for some other purpose, I do not think that makes an issue here.

Mr. Hershberger: Then, I again want to ask Counsel for the Commission whether they are willing to stipulate that there will be no issue or contention made in this case that the cost of cement in various federal projects is unreasonably high as compared with the total cost of the project. If they are willing to make stipulations that will

not be harmful, of course, we would have no purpose in offering this. I am producing this, of course, in an attempt to meet an issue which, I think, will be developed by some contention of theirs at some time.

Trial Examiner Norwood: As I understand it, one of the effects alleged of the Respondents' alleged pricing methods is that it makes cement cost more than it otherwise would; that is, it makes it cost more than it would in the absence of those conditions?

Mr. Hershberger: Your Honor, Counsel for the Commission have not confined themselves to the contention as stated by you.

35335 Trial Examiner Norwood: Whether they want it or not, it is confined to that by the pleadings.

Mr. MacIntyre: If it will save any time towards the expedition of these proceedings, we will withdraw the objection to the offer.

Trial Examiner Norwood: It may come in by consent of Counsel, but I am not willing to have a new issue raised here.

(RESP. EX. 2532 was offered and received in evidence.)

35336 *Cross-Examination by Mr. MacIntyre.*

Q. Mr. Berns, I believe that you stated at the beginning of your testimony today that your duties involved the preparation of advertising matter for use by the sales department of the Universal-Atlas Company.

A. That is right.

Q. What other duties do you have?

A. Well, among other things, the preparation of material, such as this, or any other related matters on a statistical or analytic basis.

Q. And for The Cement Institute—for use of The Cement Institute?

A. No, sir.

Q. Is it your testimony that you have not prepared the propaganda material for use by The Cement Institute?

A. No; I would not say that, because some of our people have been on committees of The Cement Institute, and I may have worked with our own people on such

35337 matters, although I, myself, have not been on any committee of The Cement Institute, but I may have collaborated with some of our officers who were.

Q. When you say that, do you mean that when Mr. B. F. Affleck, president of the Universal-Atlas Cement Company, served as chairman of the public relations committee of The Cement Institute, that you aided him in carrying out the objectives of that committee in publicizing for the Cement Institute and the cement industry, on ing for The Cement Institute and the cement industry, on behalf of its present pricing methods? Is that correct?

A. Naturally, as publicity manager of the company, he would consult me on a matter in connection with that, and when he did, I always complied with his wishes to assist him.

Q. And in so doing you prepared data for use by The Cement Institute in defense of its basing-point system?

A. I think that is right.

Q. Calling your attention to Commission's Exhibits 433, 434, 435, 436—

Mr. Hershberger: What was that first one, Mr. MacIntyre?

By Mr. MacIntyre:

Q. 433 to 437, inclusive, did you not prepare that material for use by The Cement Institute in the defense of its pricing system and method (handing the documents to the witness)?

A. Is this figure here the exhibit number?

Q. Yes.

35338 A. I accept 433 as something that I prepared.

434 I did not prepare.

435 I did not prepare.

436 I did not prepare.

437 I did not prepare.

Q. Well, you passed the last four that you mentioned on to Mr. Blaine Smith, president of the Pennsylvania-Dixie Cement Corporation, as is shown by 433, did you not, or did you?

A. I transmitted them, yes, to Mr. Smith, who was—well, he is addressed here as president of the Pennsylvania-Dixie, but I think he was at that time—well, I don't know, but he had an office in The Cement Institute at that time.

Q. You addressed him as president of the Pennsylvania-Dixie Cement Corporation?

A. Yes.

Q. And if you didn't prepare those documents, who did? You passed them on to Mr. Smith.

A. An advertising agency.

Q. An advertising agency?

A. That is right.

Q. What advertising agency?

A. Stack-Goble Company.

Q. Will you spell the name of it?

A. S-t-a-c-k—G-o-b-l-e, Stack-Goble Advertising Agency.

Q. Didn't you prepare the material that was sub-
35339 mitted to that agency for their formation of this particular material?

A. No, sir.

Q. Who did?

A. The agency did.

Q. Well, who supplied the agency with the information?

A. They consulted with various people, including myself.

Q. And you supplied the agency with some of the information that they used in the preparation of those documents?

A. I consulted with them, or they consulted with me and with others, I assume—or I know they did.

Q. Who else besides yourself did they consult with?

A. Well, I don't know in particular what other people they consulted except I do know that the agency discussing this with me had information as a basis for their discussion indicating that they must have had discussions with other people in order to have such information available.

Q. Isn't it a fact that you, in the presence of others, discussed with that agency information that was turned over to the agency in the preparation of those particular documents?

A. No, sir.

Q. You did discuss with Mr. Blaine Smith, and others in the industry, the matter of turning over to the agency information for the use by the agency in the preparation of those documents; didn't you?

A. Could I have that question again?

35340 Mr. MacIntyre: Will you please read it?

(Question read.)

A. I think that is right.

By Mr. MacIntyre:

Q. Who else besides Mr. Blaine Smith did you discuss that matter with?

A. I can't recall now except with a number of people in our own company.

Q. That is, in the Universal-Atlas Company?

A. That is right.

Q. Which would include B. F. Affleck?

A. That is right.

Q. Mr. Fred Stone?

A. That is right.

Q. You also discussed it with Mr. S. Young of the Lehigh Company, didn't you?

A. I don't believe that I discussed this particular material with Mr. Young, but I did discuss with Mr. Young some material submitted during hearings of the N.I.R.A., which were of a similar nature.

Q. And just previous to the date shown on Commission's Exhibit 433?

A. I don't know what that date is.

Q. July 18, 1934.

A. That is right.

35341 Q. That is, we understand that you did discuss with Mr. Joseph Young these matters before that date?

A. Yes, but not in connection with this particular material. My discussion with Mr. Young which I recall definitely, was at a time when he and a number of others and I happened to be in Washington at a hearing of the N.I.R.A., specifically in connection with an N.I.R.A. hearing. Subsequent to that, this material was prepared.

Q. But the discussion that you had with Mr. Young, and the correspondence you had with him, dealt with the subject?

A. With the same subject, in part.

Q. That these exhibits deal with?

A. That is right.

Q. You have stated that your duties were those of preparing advertising matter and working on other special assignments for your company. Now, I will ask you what part of your total time you used during 1934 in the preparation or the handling and discussion of such matters as appear in Commission's Exhibits 433 to 437?

Mr. Hershberger: I think that sort of a question is objectionable, Your Honor. I haven't objected to other questions, but, certainly, the question of how much time he spent doesn't have anything to do with the issues in this case.

Trial Examiner Norwood: I don't see how it does.

35342 Mr. MacIntyre: This man, of course, when he was first called to the stand, was called to the stand and testified as an employee of the Universal-Atlas Company, and, of course, so far as the record shows on his direct examination his sole duties were duties as an employee of the Universal-Atlas Company. It is my purpose to show that he, in fact, is not merely a representative of the Universal-Atlas Company, but a publicity agent for the entire industry through the offices of The Cement Institute.

Trial Examiner Norwood: I think you may bring that out, if that is the case, and you are able to do so.

Mr. MacIntyre: We just want to know who the witnesses are that testify here, that is all.

Mr. Hershberger: Go ahead. I have no objection, if that is the purpose.

Trial Examiner Norwood: Objection overruled.

Read the question and I will ask the witness to answer it.

(Question read.)

A. I would say a very small percentage.

By Mr. MacIntyre:

Q. That doesn't mean a great deal to us. Would you tell us what you mean by "small"? Twenty-five percent, fifty percent?

A. Less than that.

35343 Q. Fifty percent of your time?

A. Less than that, Mr. MacIntyre.

Q. Less than 25 percent?

A. Oh, yes, much less.

Q. Did you consider, though, at the time that you were working on this matter that it was an important part of your work, and that you were aiding it as an expression of the mouthpiece of The Cement Institute?

A. I would say in the same sense that any company employee might have to spend some time on this case, or on an N.I.R.A. matter during those days.

Q. You didn't consider these matters shown by Commission's Exhibits 433 to 437, inclusive, as anything having to do with the N.I.R.A., did you?

A. No, I said I would consider that at the time, that the time I spent on a Cement Institute matter of that kind would be in the same classification as the time I am spending now on a Federal Trade Commission hearing—is a part of my duties as an employee of my company.

Mr. MacIntyre: I just wanted to cover that ground so that if the rulings of Your Honor in rejecting certain data that was prepared by this witness should be considered on appeal, either by the Commission or the courts, we would have a showing in the record as to who had prepared them.

35344 That is all.

Redirect Examination by Mr. Hershberger.

Q. These documents, Mr. Berns, Federal Trade Commission's Exhibits 433 to 437, all refer to activities that were during the time of the N.R.A. Code, when that was in effect; do they not?

A. That is right.

Q. And the documents, 434, 435, 436, and 437, are merely copies of forms of advertisements; are they not?

A. That is right.

Q. You weren't paid any salary by the Lehigh Company or the Alpha Companies other than your own, were you, for that work?

A. No, sir; no, sir.

Q. You weren't paid any salary by The Cement Institute, were you?

A. No, sir.

Q. You were never an employee of The Cement Institute, were you, Mr. Berns?

A. No, sir.

Mr. Hershberger: I think that is all.

Mr. MacIntyre: Just one question in the light of that last question.

Trial Examiner Norwood: All right.

35345 *Recross Examination by Mr. MacIntyre.*

Q. If you were not considered as an employee or, at least, as an agent of The Cement Institute and Portland Cement Association, as well as Universal-Atlas Cement Company, why is it that you were carrying on such voluminous correspondence with The Cement Institute and with Mr. E. J. Mehren, president of the Portland Cement Association, as is shown by the record in this case?

35346 Trial Examiner Norwood: I think the shortest way, gentlemen, is to show him those exhibits and ask him to answer the question.

By Mr. MacIntyre:

Q. Well, referring to the pending question, Mr.

35347 Berns, I show you as one of the exhibits to which I had reference, Commission's Exhibit 836-3-R.

Now, with reference to that, as well as the pending question, can you answer the question?

A. Oh, I would not say that a three-page letter was voluminous, or that several one, two, or three-page letters, or a number of them, was voluminous correspondence. I wouldn't attempt to deny, and I don't intend to, that I had some correspondence in connection with this, but inasmuch as our company is a member of the Portland Cement Association, and paid dues to it, and as we were at that time a member of The Cement Institute and paid dues to it, I would say that I considered it one of my duties to see that we got as much benefit from the dues we paid by the line of activities that they undertook as we thought was helpful to us and as came within the category of my class of work.

I would like to reverse the statement as to whether I am an employee by saying that The Cement Institute, being an organization of cement manufacturers, is an agency of the manufacturer rather than my being an agency of The Cement Institute, and that the Portland Cement Association, being a group set up by manufacturers to accomplish certain things, is an agent of the manufacturers rather than my being an agent of the Association.

Q. You are making a distinction there as be-

35348 tween employee and agent?

A. No, but I said it that way because I understood your question to infer that perhaps I was on the pay roll of the Association. I would say that the Association

is on the pay roll of the companies to the extent that the companies pay dues to have the Association do certain things.

Q. You just contributed your efforts to these two associations?

A. That is right.

Mr. MacIntyre: That is all.

Mr. Hershberger: I think that is all.

Trial Examiner Norwood: Thank you, Mr. Berns.

(Witness excused.)

FREDERICK L. STONE was thereupon recalled as a witness for the Respondents, and, having been previously sworn, testified further as follows:

Direct Examination by Mr. Hershberger.

Q. Mr. Stone, I show you Respondents' Exhibit, for identification, No. 2526, and ask you whether you were in touch with the preparation of that document at the
35349 time it was being prepared by Mr. Berns, as he has testified in this case?

A. I was.

Q. Did you actively keep in touch with it at that time?

A. Yes, perhaps not—perhaps I can say not to as great an extent as Mr. Berns already testified, but it was prepared under my direction also. I had a distinct interest in it as it was being made up and watched the progress of it as they were putting it together.

Q. Do you know, Mr. Stone, what the source of the material is that was used by your various sales offices in furnishing the figures that appear upon that tabulation?

A. Yes.

Q. Do you know whether that source of material is kept in the usual and regular course of business as a matter of routine by your various sales offices?

A. It is.

Q. And is the information that appears upon that exhibit, for identification, No. 2526, information which was supplied by your sales offices taken from the records taken in the usual and regular and routine course of the business of your company?

A. Yes, that is the only source from which they could get it.

Q. And you know that that document is accurate?
A. Yes.
Mr. Hershberger: I again offer the document in evidence, Your Honor, with that supplemental testi-
35350 mony as to the source of the material.
Mr. MacIntyre: I would like to ask Mr. Stone a question or two on voir dire.
Trial Examiner Norwood: Go ahead.

Examination on Voir Dire by Mr. MacIntyre.

Q. You heard Mr. Berns' testimony about this source of material?
A. Yes.
Q. Is it your testimony that the source of material is as he has testified?
Mr. Hershberger: I don't believe Mr. Berns testified that he knew what the source of the material was, and that is the reason I am supplanting it with this testimony.
Mr. MacIntyre: He testified, and I think the record will bear me out on it, that it was taken from letters, or the source of the material was in the form of letters from the district sales managers of the various offices of the Universal-Atlas Company to the sales manager, that is, in its principal office. Now, I just want to know whether Mr. Stone has anything different to say regarding the source of material than such statement as was made by Mr. Berns.
Trial Examiner Norwood: Yes.
A. Yes, I have a different statement to make.
By Mr. MacIntyre:
35351 Q. What is it?
A. As I understood it, Mr. Berns spoke of material which you referred to as source of material, as material received in the general sales office from divisions of the sales department. I think that is where he began. I understood source of material, as you have referred to it here, to be the material used in the various divisions of the sales department that supplied the information referred to in supplying the information referred to by Mr. Berns.
Q. That is, attempting to get back to the source, yes.
A. That is what I understood.

Q. But he couldn't tell me anything beyond this series of letters.

A. That is right.

Q. Now, you are attempting to tell us something about the source beyond the series of letters?

A. Yes, before and beyond that.

Q. And what did you say about that?

A. In our various sales divisions, it seems to me that anyone would know that they could not run without a record of prices in connection with their day-to-day business. All of our sales divisions have such records that are used in the course of their daily business. I, myself, of course, have not kept such records, but in visiting our divisions, or in talking with people within the office where I
35352 happen to be located, the sales office where I happen to be located, I have looked at those records from time to time, the occasion usually being that in answer to questions, the people in direct charge of the particular division in question would have occasion to refer to their records to answer questions or to give me information, or for any reason at all.

Q. Are those records in the form of lists of basing-point prices, to which they added freight rates from The Cement Institute freight rate books and records on prices as quoted to any particular destination, when you ask for it?

A. No; I do not think that I can give you a picture from memory of every last detail on the record, but in visiting an office, I recall distinctly at times of looking at their records in a general way, not only this one record, but the other records, their files, "How do you keep this; how do you keep that; how are you getting along with this sort of thing; how are you getting along with this phase of things?" Among other things would be their record of prices, and I had particular occasion to look into this very question quite recently in connection with the Texas case. I did not have to appear, and it was not used in any appearance of mine, but the thing arose, and I was interested enough to refresh my recollection about how this record was kept. Now, we simply have a record of the prices that we are quoting at different times at various destinations, and certainly such destinations as those
35353 that appear on that Exhibit No.—what is it?

Mr. Hershberger: No. 2526.

A. No. 2526.

By Mr. MacIntyre:

Q. In what form were they kept? What was the nature of the records kept in that connection?

A. In this particular case, it was kept in the form of a large gray-colored, as I remember it, loose-leaf book, I would say about probably 18 inches by—

Q. Well, that is enough of a description of it.

A. That is enough; all right.

Q. Now, I would like to ask you, Mr. Stone, with reference to this Respondents' Exhibit 2526, for identification, whether you can tell me to what extent the so-called destination price changes appearing on this exhibit reflect only changes in freight factors as were directed to be made by the Interstate Commerce Commission, upon application, to carriers?

A. No; I cannot answer that.

Q. That is, you do not know whether it is 10 per cent, 25 per cent, 50 per cent, or 75 per cent?

A. Of what?

Q. Of the total number of changes shown.

A. Why, it would be a guess, but I am sure it would not be 75 per cent.

Q. Well, you cannot tell whether it would be 50 35354 per cent or 25 per cent?

A. I am quite sure it was not 50 per cent, or even 25 per cent but I do not know. I will say that frankly.

Mr. MacIntyre: If Your Honor please, on the offer of Mr. Hershberger of this exhibit, Respondents' Exhibit No. 2526, for identification, for the purpose of showing a lack of rigidity in delivered prices, that is, that it shows price changes for such destinations, with the uncertainty about it that the figures appearing thereon purport to be a showing of changes in destination prices, I cannot feel that it would help us. Those changes shown, as is disclosed by both witnesses who identified them, are likely to be changes, substantial as to the total number, brought about by changes in freight rates as announced by the railroads and the Interstate Commerce Commission, and not as result of any action taken by the cement manufacturers in changing their prices.

Trial Examiner Norwood: So Counsel renews the objection?

Mr. MacIntyre: I certainly do.

Trial Examiner Norwood: I think that this examination certainly does qualify the source of material, but it does not qualify this paper.

Mr. Hershberger: Your Honor, it certainly does show what the destination prices are, and with respect to
35355 the last objection made by Mr. MacIntyre, I would only say that, of course, he has the privilege, if he wants to go into those, of doing it, and developing anything that he may want to bring out; but those are destination prices shown on there, and we have proved that they are taken from the regular and customarily kept books and records of this corporation, and Mr. Stone has indicated the type of those books. Now, if we cannot show the destination prices in the way we have proven them, I do not know how we are going to prove them.

Trial Examiner Norwood: It is just this tabulation should not be received until the source of material is available to the other side to protect them.

Mr. Hershberger: They have not asked for that. I will be glad to bring that if they want it.

Trial Examiner Norwood: It is just such things that they want to know, and they have not been able to find that out from either of these witnesses.

Mr. Hershberger: They have not made that objection, that the source of the material is not available, and I will certainly be glad to make them available, if that is the only source of objection.

Mr. MacIntyre: We have not gotten to that point, in my opinion. There were so many other objections to be made to it that I did not think it necessary to come
35356 down to that. Of course, if all the other objections were removed, we would still ask for that privilege before it would be received in evidence against us.

Trial Examiner Norwood: Well, he offers it now, does he not?

Mr. Hershberger: Yes; I will be glad to produce that. I do not have it here today, but we will supply that for you.

Trial Examiner Norwood: Well, if you furnish the source of material, so that it can be determined how many of those price changes are merely changes by reason of a change in freight, leaving the price base the same—

Mr. Hershberger: Of course, we contend—

Trial Examiner Norwood: Then I think the paper might be admitted.

Mr. Hershberger: Of course, the particular objection that you now raise, I do not believe has anything to do with it, Your Honor. In other words a price change at destination is a price change at destination whether it is accomplished by freight rates or changed by something else. Our price at destination is a delivered price.

Trial Examiner Norwood: Yes.

Mr. Hershberger: We do not sell in any other way, except under our exceptions.

Trial Examiner Norwood: Oh, yes.

35357 Mr. Hershberger: But we have no objection to making available that information to counsel, if that is the only objection.

Trial Examiner Norwood: I think it makes a difference, whether the party offering this incomplete evidence has the whole story and can produce it.

Mr. Hershberger: We can.

Trial Examiner Norwood: So I shall sustain the objection.

Mr. Hershberger: That is all, Mr. Stone.

Do you have any cross-examination, Mr. MacIntyre?

Mr. MacIntyre: No.

35358 Washington, D. C.,
March 22, 1940.

35359 D. R. SUTHERLAND, being called as a witness for the Petitioners, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Hershberger.

I reside in New Rochelle, a suburb of New York City.

I am assistant to the vice president of the Universal
35360 Atlas Cement Company. I am connected with the general sales department in New York and am assistant to George H. Reiter, vice president in charge of sales.

I have been with Universal Atlas Cement Company since March 1921. My employment in 1921 was with the Atlas Portland Cement Company. I came over to "Universal"

when it acquired the assets that had formerly been owned by the Atlas Company. For a little more than two years I was statistical clerk in the St. Louis office. In 1923 I became assistant to the sales manager at the plant at Independence, Kansas and stayed there unil 1925, when I went to the Kansas City office as assistant to the sales manager; in 1930 I went to St. Louis as assistant to
35361 the western sales manager, returning to Kansas City in 1931 and staying there until I came to New York in November 1938.

Q. In your position are you in daily contact with the sales operations of your company throughout its territory?

A. Yes, sir.

Q. I show you a copy of Federal Trade Commission's Exhibit 2359-A to F, being entitled "Method of Marketing Cement," and ask you if you are familiar with that.

A. Yes, sir; I am.

Q. Do you have occasion to be in contact with the provisions of that instrument from day to day in the daily routine of your business?

A. Yes, sir; I do.

Q. I show you a copy of the Code of Fair Competition of the Cement Industry in effect during the N.R.A. period, or a part thereof, which has been introduced into this case, and I also show you two announcements to the trade issued by your company, Universal-Atlas Cement Company, one dated February 21, 1935, and one dated April 9, 1935, both of which were introduced in this case during the present week. I can't recall the exhibit numbers. Those exhibits have not yet been returned to me.

I would like to ask you, Mr. Sutherland, whether, with the documents in front of you, you can state for us the origin of each of the provisions of the "Method of Marketing" which I first handed to you?

35362 A. Yes, sir; I can.

Q. In that connection to state to us whether the provisions of the "Method of Marketing" are something new; that is, originated by it or whether they merely reflect practices that had been in existence in the industry for many years prior to the "Method of Marketing," and in instances prior to the N.R.A. Code, and whether you can indicate from an examination of those documents which I have handed you just what the origin of each provision in the "Method of Marketing" is?

A. Yes, sir.

Q. I would like to have you take those documents, Mr. Sutherland, and spread them on the table that I will set before you, and take the "Method of Marketing," paragraph by paragraph, indicating for the record the paragraph number precisely as it is indicated in the "Method of Marketing" and then make a statement for the record as to whether the particular paragraph you are then describing originated in the "Method of Marketing," first, or whether it originated under one of the sales policies that I have handed you, or whether it states a practice which originated during the N.R.A. Code under the terms of the Code, or whether it represents a practice that had been in existence prior to the N.R.A. Code?

Mr. MacIntyre: Off the record. Just a moment.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

35363 Trial Examiner Norwood: On the record.

By Mr. Hershberger:

Q. The documents which I have handed you, Mr. Sutherland, bear exhibit numbers as follows:

The "Method of Marketing Cement" is Federal Trade Commission's Exhibit 2359-A to F; the April 9, 1935, announcement to the trade of the policy of your company is Respondents' Exhibit 2481; the February 21, 1935, announcement of your company is Respondents' Exhibit 2480; and the Code of Fair Competition, to which I have referred, is Federal Trade Commission's Exhibit No. 557.

Now, will you proceed in the way I have indicated, and be careful to state accurately your sentences, so that the record will read intelligently, inasmuch as I do not want you to quote any more of the documents than is necessary. Be sure you make reference to the particular paragraph number of the "Method of Marketing" so that it can be followed in reading the record later.

A. Paragraph 1(a) of the "Method of Marketing" covers purchases by Government agencies, except Federal Emergency and Unemployment Relief agencies. The Method of Marketing provides that we will sell this business direct.

This procedure was likewise followed by us under our April 9, 1935, policy; again in our February 21, 1935, policy, under the N.I.R.A. Code, and prior to the Code,

35364 and, therefore, such business has been sold direct ever since I have been in the cement business.

Paragraph 1(b) covers purchases by Federal Emergency or Unemployment Relief agencies.

Under the "Method of Marketing" we sell this business through a dealer. This is likewise the way we sold under our policy of April 9, 1935, but it is slightly different than under our policy of February 21, 1935, due to the fact that under the February 21st policy such business was sold to a dealer only when it was entirely within the city, town, or village.

Under the N.I.R.A. Code such business was sold direct. Prior to the Code, emergency and unemployment relief agencies had not existed for very long, but when they first came into being we sold any business to the Federal Government direct. However, such business as is ordinarily covered by federal emergency or unemployment relief agencies prior to the establishment of such agencies was business that would be sold through a dealer.

Q. Now, take the next paragraph, please, and proceed.

A. Paragraph 1(c), under the "Method of Marketing," covers purchases by contractor for work awarded by Government agencies, except by federal emergency and unemployment relief agencies.

Paragraph 1(c)(1) covers such business when it 35365 is located entirely within cities, towns, or villages.

Under the righthand column, under the "Method of Marketing," we provide for sales to a dealer. This is the same as our April 9 policy, our February 21 policy, the N.I.R.A. Code, and prior to the Code; so, again, it is business that we have sold through a dealer as long as I have been in the cement business.

Paragraph 1(c)(2) covers purchases by contractors, as I just described a moment ago, when located entirely or partly outside of cities, towns, or villages.

Under the righthand column of "Method of Marketing" we sell direct. This is the same as our April 9 policy, our February 21 policy, the N.I.R.A. Code, and prior to the Code, and represents no change from my experience as long as I have been in the cement business.

Q. Let me interrupt you just a moment. You have not been mentioning the years of the policy, and may it be understood that when you have referred to the April and February policy you are referring to the year 1935 policy?

A. Yes.

Q. All right.

Mr. MacIntyre: I would suggest, in that connection, that it would be better, in referring to the policy, to refer to the Respondents' exhibit number. I think that would be a shorter method.

35366 Trial Examiner Norwood: All right.

Mr. Hershberger: I think that is a very good suggestion.

Mr. MacIntyre: That is, as to each of these documents.

Trial Examiner Norwood: Go ahead.

A. (Continuing.) Paragraph 2(a) of Commission's Exhibit 2359-A to F covers purchases by State agencies except State and federal emergency or unemployment relief agencies and State institutions for highway pavements and grade-crossing elimination projects.

Under the righthand column, we sell direct. This is the procedure that we followed under Respondents' Exhibit 2481, Respondents' Exhibit 2480, and Commission's Exhibit 557, prior to the N.I.R.A. Code; so that, again, there is no departure from our present practice, or since I have been in the cement business.

Paragraph 2(b) of Federal Trade Commission's Exhibit 2359-A to F covers purchases by State agencies, except State and federal emergency or unemployment relief agencies and State institutions for work other than highway pavements and grade-crossing elimination projects.

Under the righthand column, we sell through a dealer.

35367 This is the same as under Respondents' Exhibit 2481, but it is slightly different than Respondents' Exhibit 2480, under which we sold such business direct.

The same procedure was—that is, of selling such business direct—followed by us under the N.I.R.A. Code, but prior to the N.I.R.A. Code we sold this business through a dealer.

By Mr. Hershberger:

Q. Now, just examine your documents again and see whether that is correct. You are talking about 2(b), are you not?

A. 2(b). We now sell such business through a dealer.

Q. Yes.

A. Likewise under our April 9th policy.

Q. Yes.

A. However, under our February 21 policy, it was sold

direct, as it was under the N.I.R.A. Code, and prior to the Code it was sold direct.

Q. All right. Proceed.

A. Paragraph 2(c) of Commission's Exhibit 2359-A to F covers purchasers by State and federal emergency or unemployment relief agencies and State institutions for any work whatever.

Under the righthand column, we sell to dealer. This is as is provided in Respondents' Exhibit 2481, but again is a departure to some extent from Respondents' Exhibit 2480, in that under that policy such business was sold direct,

35368 if partly or entirely outside the city, town, or village. This was likewise true under Commission's Exhibit 557, and the same thing applies here as I spoke of in relation to federal emergency and unemployment relief under paragraph 1(b).

Q. What was the practice before the N.R.A. Code? Have you stated that?

A. Before the N.I.R.A. Code, we sold such business direct, but again I want to point out to you that the emergency and unemployment relief agencies were not in being long before the N.I.R.A. Code, and prior to their establishment such business as we now sell for work done by those agencies was formerly dealer business.

Q. All right. Proceed.

A. Paragraph 2(d) of Commission's Exhibit 2359-A to F covers purchases by contractors for highway pavements and grade-crossing elimination projects awarded by State agencies except State and federal emergency or unemployment relief agencies and State institutions.

Paragraph (d)(1)—

Q. Is that 2(d)(1)?

A. 2(d)(1). —covers such work located entirely within cities, towns, and villages. In the righthand column, we sell through a dealer. This practice was followed by us under Respondents' Exhibits 2481, 2480, Commission's Exhibit 557, and prior thereto, and represents no change from the practice I have known since I have been in the cement business.

35369 Paragraph 2(d)(2) covers such work located entirely or partly outside of cities, towns, or villages. Under the righthand column, we sell this direct. We followed this method of quoting and selling such business under Respondents' Exhibits 2481, 2480, Commission's 557,

and prior thereto, and so, again represents no change from our method of solicitation or sales since I have been in the cement business.

Paragraph 2(e) of Commission's Exhibit 2359-A to F covers purchases by contractors for work awarded by State agencies except State and federal emergency or unemployment relief agencies and State institutions for work other than highway pavements and grade-crossing elimination projects; and under the righthand column we sell through a dealer. This is the same practice as we follow under Respondents' 2481, but under Respondents' 2480 there was some departure in that again—no. Wait a minute. Yes. —in that if such work was partly or entirely outside of a city, town, or village, we would sell direct. This was likewise true under Commission's 557. Prior, however, to the N.I.R.A. Code, this business was handled through the dealer, and so we are now following the same practice that we did prior to the Code.

Paragraph 2(f) of Commission's 2359-A to F covers purchases by contractors for State institution work of any kind whatever. Under the righthand column we sell this through a dealer, as we likewise did under Re-
35370 spondents' 2481. The soliciting and selling of such business under Respondents' 2480 was again slightly different because of the fact that if it were partly or entirely outside of a city, town, or village, we would sell direct. This same procedure we followed under Commission's 557, but prior to the Code such work was sold through the dealer. Again we are selling today as we sold prior to the Code.

Paragraph 3(a) of Commission's 2359-A to F covers purchases by counties for highway pavement contracts and bridge, culvert, and repair work awarded as part of highway pavement contracts. Under the righthand column, we sell direct. This is the same as we followed under Respondents' 2481, Respondents' 2480, Commission's 557, and prior to the N. I. R. A. Code. So, again, we are following the practice today that we have followed ever since I have been in the cement business.

Paragraph 3(b) of Commission's 2359-A to F covers purchases by counties for work other than highway pavement contracts, and bridge, culvert, and repair work awarded as part of highway pavement contracts. Under the righthand column, we sell dealer, as we likewise do un-

der Respondents' 2481. Under Respondents' 2480 a departure was made in that when such work was partly or entirely outside of the city, town, or village, we sold it direct,
and we likewise followed a method of selling direct
35371 during Commission's 557. Prior to the N. I. R. A.
Code, most of this business we sold through a dealer. There were some exceptions.

Q. When you say "through a dealer," of course you mean you sold to a dealer in all instances?

A. Yes. I was adopting there that terminology because it was in the "Method of Marketing" and I thought it might be clear. However, such sales we made to a dealer.

Q. All right. Go ahead.

A. Paragraph 3(c) of Commission's 2359-A to F covers purchases by contractors for county highway pavement contracts and bridge, culvert, and repair work awarded as part of highway pavements.

Paragraph 3(c)(1) covers such business when located entirely within cities, towns, and villages. Under the righthand column we sell through a dealer. We followed this method of quoting and selling under Respondents' 2481, Respondents' 2480, Commission's 557, and prior to the N. I. R. A. Code. And so again this is business which we are selling today in exactly the same way that we have sold it ever since I have been in the cement business.

Paragraph 3(c)(2) covers such purchases when located entirely or partly outside of cities, towns, and villages, and in the righthand column we sell direct, as we likewise do under Respondents' 2481, 2480, Commission's 557, and
prior thereto. So once more here is business that
35372 we are selling today in just the way we have sold
it since I have been in the business.

Paragraph 3(d) of Commission's 2359-A to F covers purchases by contractors for work other than county highway pavement contracts, and bridge, culvert, and repair work awarded as part of highway pavement contracts. Under the righthand column we sell through a dealer. We likewise do under Respondents' 2481. Under Respondents' 2480, we departed somewhat in that when such business was partly or entirely outside of a city, town, or village, we sold it direct. This procedure that I just described we followed under Commission's 557, but prior to the N. I. R. A. Code we sold this business to a dealer. So that we

are selling today in the same way that we sold prior to the N. I. R. A. Code.

Paragraph 4(a) of Commission's 2359-A to F covers purchases by railroads filing tariffs with the State or interstate commissions.

Paragraph 4(a)(1) covers such purchases for specific work.

Under the righthand column we sell direct. We have so sold under Respondents' Exhibit 2481, Respondents' Exhibit 2480, Commission's Exhibit 557, and prior thereto, and we are selling such work today in exactly the same way as we have sold it ever since I have been in the business.

Paragraph 4(a)(2) covers such purchases for maintenance work. Under the righthand column we sell
35373 direct. What I have just said about paragraph 4(a)(1) applies to paragraph 4(a)(2). We sell it today as we have always sold it ever since I have been in the business.

Paragraph 4(b) covers purchase by contractors for specific work awarded by railroads filing tariffs with the State or Interstate Commerce Commission.

Paragraph 4(b)(1) covers such work when located entirely within cities, towns, or villages. Under the righthand column we sell through a dealer. This practice we followed under Respondents' Exhibit 2481, Respondents' Exhibit 2480, Commission's Exhibit 557, and prior thereto, and it, therefore, reflects the same method of quoting and soliciting this type of business as we have followed ever since I have been in the cement business.

Paragraph 4(b)(2)—

Q. Just a moment, please. Stop there for a moment. You were talking about 4(b)?

A. 4(b)(1), contractors for specific work for railroads filing tariffs when such work is entirely within a city, town, or village.

Q. Will you please look at the N. R. A. Code and see whether your answer with respect to that particular time is correct? I think you said it was sold—or give us what your answer should be.

A. Yes; I would like to correct my testimony.
35374 Under Commission's Exhibit 557 we followed the Code when it was in effect, and quoted and sold contractors doing work for railroads filing tariffs with the

State or Interstate Commerce Commission direct, no matter the location of the work. Otherwise, what I stated is correct.

Paragraph 4(b)(2) covers purchases by contractors for specific work awarded by railroads filing tariffs with the State or Interstate Commerce Commission, when such work is located entirely or partly outside of cities, towns, or villages.

Under the righthand column, we sell direct. We have so quoted and sold under Respondents' Exhibit 2481, Respondents' Exhibit 2480, Commission's Exhibit 557, and prior thereto, and we are quoting and selling such work today in exactly the same way as we have ever since I have been in the business.

Paragraph 5(1)(a) of Commission's Exhibit 2359-A to F covers purchases by owners, except cities, towns, and villages, for water supply development work.

Paragraph 5(1)(a)(1) covers such work located within or local to cities, towns, or villages such projects are designed to serve.

Q. Just a moment. I believe you skipped 4(c), did you not, Mr. Sutherland? You did not mention that, as I recall it.

A. Yes. Do you want me to go back and cover that?

35375 Q. Just make a notation of what the method of marketing provides in regard to that.

A. Paragraph 4(c) covers purchases by railroads not filing tariffs with the State or Interstate Commerce Commission, and by contractors for work for such railroads. The righthand column provides that we sell as specified under paragraph 10 of Commission's Exhibit 2359-A to F.

Q. So that when you reach paragraph 10 what you say in that regard will apply back to this paragraph 4(c)?

A. That is correct.

Q. All right. Now, go back to paragraph 5(1).

A. Paragraph 5(1)(a)(1) covers water supply development work when purchased by owners, except cities, towns, and villages, when located within or local to cities, towns, or villages such projects are designed to serve. Under the righthand column we sell through dealer. This is likewise true under Respondents' Exhibit 2481. A slight departure we followed under Respondents' Exhibit 2480, in that we sold through a dealer only when such work was

located entirely within a city, town, or village. Under Commission's Exhibit 557 we sold through a dealer only when such a project required dealer's service. Prior to the N.I.R.A. Code we quoted and sold such business through a dealer. So that today we are selling and quoting as we did prior to the N.I.R.A. Code.

Paragraph 5(1)(a)(2) of Commission's Exhibit
35376 2359-A to F covers water supply development work purchased by owners, except cities, towns, and villages when such work is located outside and not designed to serve cities, towns, or villages local to such projects. Under the righthand column, we sell direct. This practice of quoting and selling we likewise followed under Respondents' Exhibit 2481, Respondents' Exhibit 2480, Commissions' Exhibit 557, and prior to the N.I.R.A. Code, and, again, is business that we sell today in just the way that we have ever since I have been in the cement business.

Paragraph 5(1)(b) covers water supply development work when purchased by cities, towns, or villages. The righthand column refers to paragraph 9 of Commission's Exhibit 2359-A to F, city, town, or village work, and whatever I testify in connection with that paragraph would apply to paragraph 5(1)(b).

Paragraph 5(1)(c) of Commission's Exhibit 2359-A to F—

Mr. MacIntyre: Just a moment. Off the record.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: Go ahead but state them as tersely as you can.

The Witness: Yes.

A. Paragraph 5(1)(c) covers purchases by contrac-
tors for water supply development work when located
35377 within—I would like to modify that to paragraph
5(1)(c)(1).

Trial Examiner Norwood: Tell us about the method.

Mr. Hershberger: May I make sure that the Reporter has that number correctly?

Trial Examiner Norwood: Go ahead.

Mr. Hershberger: What number have you, Mr. Reporter?

The Reporter: Paragraph 5(1)(c)(1).

Mr. Hershberger: All right.

A. That covers purchases by contractors for water supply development work located entirely within or local to cities, towns, or villages such projects are designed to serve. Under the righthand column we sell through dealer. This same method of quoting and selling we followed under Respondents' Exhibit 2481, Respondents' Exhibit 2480 —I would like to modify that to the extent that under Respondents' Exhibit 2480 a slight deviation was made, in that such business would be sold direct if it were partly or entirely outside of a city, town, or village. Under Commission's Exhibit 557 it was sold through a dealer if it required dealer service. Prior to the N. I. R. A. Code it was sold both through a dealer and direct.

Paragraph 5(1)(c)(2) covers such purchases when located outside of and not designed to serve cities, towns, or villages local to such projects. Under the righthand column we sell direct. We followed the same method of quoting and selling under Respondents' Exhibit 2481, 35378 Respondents' Exhibit 2480, Commission's Exhibit 557, and prior to the N.I.R.A. Code, and, again, we are quoting and selling in the same way as we have done ever since I have been in the business.

Paragraph 5(2)(a)(1) covers purchases by owners, except cities, towns, and villages, for large water power flood control and irrigation work. Under the righthand column we sell through dealer.

Q. Just a moment. Did you indicate whether that was within or outside of the cities in your answer?

A. I meant to.

Mr. Hershberger: May I have that answer read, please?

Trial Examiner Norwood: Read it.

(Record read as follows:

"Paragraph 5(2)(a)(1) covers purchases by owners, except cities, towns, and villages, for large water power flood control and irrigation work.")

A. (Continuing.) When located entirely within cities, towns, or villages. Under the righthand column we sell through dealer. This same policy of quoting and selling was followed by us under Respondents' Exhibit 2481, Respondents' Exhibit 2480, under Commission's Exhibit 557 when dealer's service was required, and prior to the N.I.R.A. Code we sold such business to a dealer, so that we are selling today as we did prior to the N.I.R.A. Code.

35379 Q. What was it you stated under the Code in that respect?

A. Under the Code such business was sold through a dealer when it required dealer service.

Q. I see.

A. Paragraph 5(2)(a)(2) covers purchases that I just previously described except when located entirely or partly outside of cities, towns, and villages. In the righthand column, we sell direct. We followed this same method of quoting and selling under Respondents' 2481, Respondents' 2480, Commission's 557, again except those projects which required dealer service, and prior to the N.I.R.A. Code I would say that most of it was sold direct, but there were cases when we sold to a dealer.

Paragraph 5(2)(b) covers purchases by cities, towns, and villages for large water power, flood control, and irrigation work. Under the righthand column, it refers to paragraph 9 of Commission's 2359-A to F, and my testimoney regarding that paragraph will apply to this one.

Paragraph 5(2)(c) of Commission's 2359-A to F covers purchases by contractors for large water power, flood control, and irrigation work, and under (1) thereof covers work located entirely within cities, towns, and villages. Under the righthand column—

Q. Just a moment. You mean by that, then, that you are talking now about paragraph—

35380 A. 5(2)(c)(1).

Q. All right.

A. This policy was followed by us, that is, selling to a dealer under Respondents' 2481, 2480, under Commission's 557 when the project required dealer service, and prior to the N.I.R.A. Code, so that today we are selling this business in exactly the same way we have done since I have been in the business.

Q. Just stop a minute, please.

(Pause.)

All right. Proceed.

A. Paragraph 5(2)(c)(2), Commission's 2359-A to F, covers large water power, flood control, and irrigation work purchases by contractors when located entirely or partly outside of cities, towns, and villages. Under the righthand column we sell direct. We followed this same method of quoting and selling under Respondents' 2481, 2480, un-

der Commission's 557 when no dealer service was required, and prior to the N.I.R.A. Code.

Paragraph 6 covers purchases by contractors but no specific provisions are made in Commission's Exhibit 2359-A to F in that reference, as such business is specifically covered elsewhere in the exhibit.

Paragraph 7(a) of Commission's 2359-A to F covers purchases by manufacturers of concrete and cement
35381 products which they use exclusively in their own manufacturing operations of such products, except purchases for concrete pipe and tile manufactured for specific work. Under the righthand column, we sell direct or through dealer. This is slightly different from Respondents' 2481, which provides for direct sale only.

Trial Examiner Norwood: Now, I don't think that you need to tell us the contents of those paragraphs.

The Witness: All right, sir.

Trial Examiner Norwood: Just refer to the contents and then discuss the method.

Mr. Hershberger: He will be through in a very short time, Your Honor. I would like to have him make those distinctions, if you don't mind. It will only take a few minutes longer. We are practically through with it.

Trial Examiner Norwood: He needn't describe it as fully as he has been doing as to what it provides.

By Mr. Hershberger:

Q. All right, make it as brief as you can in describing any differences that there are.

A. We likewise sold direct under Respondents' 2480, Commission's 557, and prior to the N.I.R.A. Code we sold both direct and to a dealer.

Paragraph 7(b), purchases by concrete pipe and tile manufacturers for their products for specific work.
35382 Under the righthand column, sell direct. This practice of quoting and selling we followed under Respondents' 2481, 2480, Commission's 557, and prior thereto, and represents no departure from our practice of quoting and selling such business since I have been in the cement industry.

Paragraph 7(c)—

Q. Just a moment. Just wait a moment, please. (Pause.) All right. Proceed.

A. Paragraph 7(c), purchases by pipe manufacturers

for annual requirements of cities, counties, State, industrials, or contractors. Under the righthand column, sell direct or through dealer, and the testimony I gave regarding paragraph 7(a) may be adopted for 7(c).

Q. 7(a) or 7(b)?

A. 7(a).

Q. All right.

A. Paragraph 8(a), purchases by—

Q. Just a minute. Is there a 7(c)?

A. Yes, sir; I just covered it.

Trial Examiner Norwood: He just discussed that.

By Mr. Hershberger:

Q. Oh, excuse me. I thought you were discussing a different number.

A. Paragraph 8(a) of Commission's 2359-A to F covers purchases by commercial concrete mixing plants for
35383 their own operations. Under the righthand column, sell direct. This same method of selling we followed under Respondents' 2481, 2480, Commission's 557, and prior to the N.I.R.A. Code, although there were instances of this business having been sold by us through a dealer prior to the N.I.R.A. Code.

Paragraph 9(a), Commission's Exhibit 2359-A to F, covers purchases by cities, towns, and villages. Under the righthand column, sell through dealer. This same policy we followed under Respondents' 2481, 2480, Commission's 557, and prior thereto, and we are selling such work today in exactly the same way we have sold it since I have been in the cement business. I would like to observe, however, in that connection, that under Respondents' 2480 and Commission's 557, that if a city, town, or village purchased cement for a water supply development or a large water power or flood control or irrigation work, and it was located partly or entirely outside of a city, town, or village, we would sell direct.

Paragraph 9(b), Commission's 2359-A to F, covers purchases by contractors for specific work awarded by cities, towns, and villages. In the righthand column, sell through dealer. This same policy we followed under Respondents' 2481, and also under Respondents' 2480, and Commission's 557, and prior to the N.I.R.A. Code, but, again, as I described at the latter part of my testimony regarding paragraph 9(b), if such work were partly or entirely out-

side of a city, town, or village, we would sell direct
35384 under 2480, and if it required dealer service, we would sell to a dealer under—let me change that: If it did not require dealer service, we would sell direct under Commission's 557.

Paragraph 9(c), Commission's 2359-A to F, covers purchases by contractors for work other than specific work awarded by cities, towns, and villages. Under the right-hand column, sell through dealer. This same policy we follow under Respondents' 2481 and did under Respondents' 2480 and Commission's 557, and prior to the N.I.R.A. Code, and so there is no change in our method of handling this kind of business today than there has been at any time since I have been in the cement business.

Paragraph 10(a) covers purchases by owners except for water supply developments and large water power, flood control, and irrigation projects, industrials, public utilities, and railroads not filing tariffs with State or Interstate Commissions. Under the righthand column, sell through dealer. This same policy we followed under Respondents' 2481, 2480, Commission's 557, and prior to the N.I.R.A. Code, and represents no change in our method of quoting and selling such business from that since I have always known since I have been in the business.

Paragraph 10(b), Commission's 2359-A to F, covers purchases by contractors for specific work awarded by owners with the same exceptions that I mentioned
35385 in paragraph 10(a). Under the righthand column, sell through dealer. This same policy we followed under Respondents' 2481, 2480, Commission's 557, and prior thereto, and represents no change in the method of quoting and selling such business since I have been in the cement business.

Paragraph 10(c) covers purchases by owners and/or contractors for water supply development, large water power, flood control, and irrigation projects, and the testimony I gave regarding paragraphs 5(1) and 5(2) can be adopted for paragraph 10(c).

Paragraph 11 of Commission's 2359-A to F covers purchases not specifically covered in the foregoing classes that I described. Under the righthand column, sell through dealer. This same practice was followed under Respondents' 2481, 2480, Commission's 557, and prior thereto, and represents no change.

Q. Thank you, Mr. Sutherland.

Mr. Hershberger: May we have a recess at this time, Your Honor?

Trial Examiner Norwood: Yes; five-minute recess.

(There was a short recess taken.)

By Mr. Hershberger:

Q. Now, Mr. Sutherland, referring to the documents to which you have been testifying, to-wit, Federal Trade Commission's Exhibit 2359-A to F, Respondents' Exhibit 2481, Respondents' Exhibit 2480, and Federal Trade
35386 Commission's 557, will you state under which of those documents, if any, your company was obliged or obligated or required to follow the practice which you have stated was the practice under the various instruments referred to?

A. Only during the N.I.R.A. Code, or in the N.I.R.A. Code covering Commission's Exhibit 557, in so long as Article XI thereof was in effect.

Q. Were all of the statements which you made regarding your practices under the N.I.R.A. Code in reference to statements that are found in Article XI of that Code?

A. Yes, sir.

Q. And with respect to Respondents' Exhibit 2480, was your company obliged to follow the provisions which you have testified were in effect or were your practices under that document?

A. No, sir; not at all.

Q. And with respect to Respondents' Exhibit 2481, was your company obligated to or obliged to follow the practice which you have testified it did follow under that document?

A. No, sir.

Q. In regard to Federal Trade Commission's Exhibit 2359-A to F, has your company at any time been obligated or obliged to follow the provisions which you have testified to with respect to that instrument?

Mr. MacIntyre: I object. He is asking for a conclusion
35387 from the witness as to whether or not he is obliged to do one thing or the other. There has been nothing yet in the way of a foundation laid to show what is meant by an answer to such a question.

Mr. Hershberger: Well, let me change the question a little. I think the objection is well taken.

Trial Examiner Norwood: All right.

By Mr. Hershberger:

Q. Under Respondents' Exhibit 2359-A to F, will you state whether your company has any understanding, agreement, or contract with any other cement manufacturer or with any other person, firm, or corporation, to follow the practices as stated in that exhibit?

35388 A. Certainly not, as far as I know anything about it.

Q. Will you state whether there have been variations in your actual practice from the practices set forth in Federal Trade Commission's Exhibit 2359-A to F?

A. Yes; there have been.

Q. And are there at the present time?

A. Yes, sir; there are.

Q. Will you name several, just by way of illustration, typical examples?

A. Well, for instance, in the State of North Carolina, we quote and sell directly to the W.P.A., a federal emergency or unemployment relief agency, under which, according to Commission's Exhibit 2359-A to F, paragraph 1(b), we sell through dealer.

Mr. MacIntyre: Now, if Your Honor please, as to this last answer, I think we should have the time stated, because it has been shown that such a deviation as in that particular instance occurred only since the complaint in this case.

Mr. Hershberger: That is a matter of cross-examination. We have no objection to your cross-examining him on that.

Mr. MacIntyre: But there is no need of loading up the record with a lot of information that is without any relevancy.

35389 Trial Examiner Norwood: I think its relevancy should appear there. What time are you speaking of?

The Witness: Well, I cannot, Your Honor, remember definitely the date of origin, but it was some time, I think, in the summer of 1935.

By Mr. Hershberger:

Q. And since that time?

A. When we inaugurated such a practice, and we have followed that since. We likewise from about the same date, and with the same class of business, followed the same practice that I have just previously described, in the State of Virginia. For instance, paragraph 8, commercial con-

crete mixing plants, Commission's Exhibit 2359-A to F, provides that we sell direct, but since 1932 and before, we have sold concrete ready-mix plants in Kansas City and Duluth, for example, through a dealer, and never direct.

Q. Those are typical examples, are they, of others that could be named?

A. Yes.

Q. Of variations from the practice?

A. Yes, sir.

Mr. Hershberger: That is all, Your Honor.

Trial Examiner Norwood: You may cross-examine.

Cross-Examination by Mr. MacIntyre.

35390 Q. Mr. Sutherland, in your last answer you have given us two or three examples of deviations from the stated policies as set forth in Commission's Exhibit 2359-A to F, and you named one instance in North Carolina, one in Virginia, one in Kansas City, and one in Duluth. Can you name us any others?

A. Yes, sir.

Mr. Hershberger: Just a moment. I do not think that question is quite accurate. I do not believe that was meant to be a single deviation, but a policy deviation. I just wanted to point that out, to be fair to the witness. He is not talking about the same thing that you are, Mr. MacIntyre.

Mr. MacIntyre: Well, they are instances of policy deviations.

Mr. Hershberger: Not isolated transactions.

Mr. MacIntyre: Well, we will find out from the witness how isolated they are.

Mr. Hershberger: All right.

A. Well, Mr. MacIntyre, under paragraph 2(b) of Commission's Exhibit 2359-A to F, purchases by State agencies, except emergency or unemployment relief agencies and State institutions for work other than highway pavements and grade-crossing eliminations, the righthand column says sell to dealer. In numerous States, Kansas, Oklahoma, Missouri, Illinois, and New York, and others that I cannot immediately call to mind, we sell the
35391 State highway department direct for maintenance requirements.

By Mr. MacIntyre:

Q. But only for maintenance requirements?

A. Well, that, of course, I don't know, in that I don't know what the actual use of the cement is. Certainly we sell the State highway department direct, and they can use it for a garage building or anything else.

Q. But you would not permit them to buy it direct if you knew they were making such use of it; you would go back to your stated policy, as is set forth in Commission's Exhibit 2359-A to F, would you not?

A. No. I can recall one definite exception to that, and I am sure there are others that I cannot immediately bring to mind, but, for instance, the State of Kentucky, their department of purchases. I think that is the name of it—we will sell them direct for anything—a fish hatchery or what not.

Q. Would you say that it is your testimony that in the main that you do adhere to the stated policies as set forth in Commission's 2359-A to F?

A. I would say that in the main we do, but there are substantial variations.

Q. In particular locations?

A. That is correct, but those locations are quite wide.

Q. Your policy isn't changing in those particular locations; that is, you have a consistent policy in those 35392 particular locations?

A. Yes. These variations that I have mentioned are consistent variations.

Q. And they are well known to the trade?

A. Yes.

Q. Including your competitors?

A. That I don't know.

Q. You have stated that you are obligated to follow the provisions of the sales policy as set forth in Article XI of Commission's Exhibit 557. You stated that it was during a certain period. Will you please tell us what that period was, that is, from what date?

A. My recollection is that Article XI was discontinued from the N.I.R.A. Code in January of 1934.

Q. During that period do you feel that you were obligated to follow that?

A. From the period of the approvement of the N.I.R.A. Code until the elimination of Article XI thereof in January, 1934.

Q. And never after that?
A. Never after that under Article XI.
Q. You did follow it, though?
A. Sir?
Q. You did follow it, though, after that?
A. Well, again, Mr. MacIntyre, I can't remember specifically, but I do remember that there have been
35393 variations from the sales policy always except during in this N.I.R.A. period.
Q. When this Article XI was suspended from the N.R.A. Code, in January, 1934, were any changes made in your policy that you could recall?
A. Generally, I would say not; that is, we continued to follow, certainly, for some immediate time the same method of selling or policies of selling that we had followed under Article XI.
Q. You would say that is true except as it is shown by Respondents' 2480, 2481, and Commission's 2359-A to F?
A. Yes, but again with variations.
Q. That is, probably consistent variations in a few instances in certain particular locations; is that correct?
A. Yes, but I don't want to give the inference by my testimony that the variations were sporadic or limited. There have always been quite a number.
Q. Well, I thought we had been over that. That was consistent in that it took place in a particular location.
A. Yes, sir.
Q. Can you tell us, Mr. Sutherland, what use you made of this statement of policy, as shown by Commission's Exhibit 2359-A to F?
A. When we received that from our office in Chicago, and at that time—and the time was, well, probably the latter part of May, May 29th or 31st, or the first
35394 week in June of 1935, we—or I gave it to our various clerks in the Kansas City office who had anything to do with handling of sales matters, sent it out to our salesmen in the field, and there were a few of our customers to whom we gave that exhibit.
Q. It was principally, though, used by these sales clerks in your office and your salesmen?
A. Yes, sir. I found it handy and a quick way of following in detail our policy of April 9, 1935, or Respondents' Exhibit 2481.
Q. Had you seen such a document prior to the time you received it in, say, around the first of May, 1935?

A. Yes. I got from our Chicago office a policy or a statement similar to that asking us if we had any suggestions to make as to the revising of it. I think—

Q. What date was that?

A. Well, of course, I don't remember, but I would say maybe three weeks prior to receiving the document.

Q. That was just previous to this announcement of April 9, 1935, as is shown by Respondents' Exhibit 2481; isn't that correct?

A. No, Mr. MacIntyre. I think it was after that.

Q. Isn't it a fact, Mr. Sutherland, that you did get some request for suggestions along that line during the period between February 21, 1935, and April 9, 1935?

A. From whom?

35395 Q. From your Chicago office.

A. I would like to have the question read. I don't have the dates in mind.

Trial Examiner Norwood: Read it.

(Record read.)

A. I don't remember any, no.

By Mr. MacIntyre:

Q. You don't recall receiving such request from anyone?

A. In our Chicago office?

Q. I am talking about anyone.

A. Well, I recall this, Mr. MacIntyre: Following our February 21st policy, Commission's—or Respondents' Exhibit 2481—

Q. That is 2480.

A. 2480, a number of dealers talked to me, personally came into the office and objected to some of the provisions of that particular policy.

Q. That is, to the policy as shown—

A. To the February 21, 1935.

Q. Respondents' Exhibit 2480?

A. That is correct.

Q. And one of those men was Mr. E. E. Woods?

A. Yes, I remember Mr. Woods' conversation quite well.

Q. What did you tell him?

A. I told him that I would—that I was glad to have his suggestions and would pass them along to our people in Chicago.

35396 Q. Did you pass them along?

A. Sir?

Q. And you did pass his suggestions along to your Chicago office?

A. Yes, sir.

Q. To whom in your Chicago office did you pass them?

A. At that time we reported to O. H. D. Rohwer, assistant general sales manager, and, in turn, to F. L. Stone, general sales manager.

Q. Did you hear of Mr. Scovel's name in that connection?

A. In connection with what, Mr. MacIntyre?

Q. With the suggestions that you passed along?

A. No, sir; other than Mr. Scovel was working with Mr. Rohwer in Mr. Rohwer's office, and frequently or generally Mr. Scovel and I, being correspondents, so to speak, would address letters to each other's attention.

Q. So when you say you sent them to Mr. Rohwer, you sent them to Mr. Rohwer and Mr. Scovel, of course?

A. I assume Mr. Scovel would have seen them, yes.

Q. Did you attend any meetings in Chicago or elsewhere at which the suggestions made to you by Mr. E. E. Woods were discussed?

A. No, sir; I did not.

Q. Mr. Woods asked you to, didn't he?

A. I think not.

35397 Q. Didn't Mr. Woods tell you about attending a meeting in Chicago during March or April of 1935?

A. I am not sure that he did. I have no recollection of discussing that with him.

Q. Did he inform you that he was to place before a meeting in Chicago the suggestions that he had placed before you?

A. No, sir; I don't have any such recollection.

Q. What were the suggestions that Mr. Woods made to you at the time that he called on you?

A. I can't, of course, remember them in detail, but he said in substance that he felt that we should be willing to solicit and sell more business to a dealer than we said we would under our February 21, 1935, policy.

Q. And that is what you are doing now?

A. Sir?

Q. You are selling more through the dealers than you had announced through that policy of February 21 that you would do; isn't that correct?

A. Yes, we are selling some business direct—or through

a dealer today that we sold direct under the February 21, 1935, policy.

Q. And to that extent your company adopted the suggestions that Mr. Woods made; isn't that correct?

A. Well, I can't answer that "yes" or "no," Mr. MacIntyre, because I don't remember in detail what
35398 suggestions Mr. Woods made.

Q. Can you name any suggestion that he made that your company did not adopt?

A. No, sir.

Q. You have stated, of course—

A. Only because I can't remember, Mr. MacIntyre.

Q. You have stated in general the substance of his suggestions, of course.

A. Yes.

Q. And the record shows whether or not your company has adopted those. What did you mean when you stated that you remembered and recalled your conversation with Mr. Woods very clearly?

A. Well, one reason for that is that he has been a personal friend of mine for a number of years, in that I have a father-in-law whose name is Ernest Wood, and they have been friends, and he was a family friend, and it was through that personal connection that I happen to remember discussing it with him.

Q. You have principally known Mr. Woods in addition to knowing him in a personal way as secretary and manager of the Southwestern Lumbermen's Association?

A. I believe he has such an office as that, yes.

Q. Well, in the business way that you have known him, you have known him in that connection; isn't that correct?

A. Yes, I would say so. I have known him both
35399 businesswise and personalwise.

Q. But have you known him in any business way other than as secretary and manager of the Southwestern Lumbermen's Association?

A. Yes; I knew him when he was with the O. E. Woods Lumber Company in Claremore, Okla.

Q. That was a good many years ago, wasn't it?

A. Yes, that was quite a long time ago, but I believe he still takes more or less an active part in the O. E. Woods Lumber Company, who are in business today.

Q. Now, previous to your receiving a copy of the document which is shown by Commission's Exhibit 2359-A to F, had you seen such a document?

A. As I testified a little while ago, I think that the latter part of April we received from our Chicago office a document somewhat similar asking us to read it and to send back any suggestions that we cared to make.

Q. But previous to that had you seen such a document?

A. No, sir.

Q. In all your experience in the cement business?

A. No.

Q. Did you talk to Mr. E. E. Woods about this draft of this document that you had received from your Chicago office?

A. No, sir; I did not.

Q. Have you seen drafts of similar documents in
35400 the hands of representatives of other companies?

A. No, sir.

Q. This is the first document of its kind that your company ever mimeographed and distributed, isn't it?

A. Yes, I don't think we ever did it in that way before.

Q. What did you say is the need for such a document today?

A. Well, Mr. MacIntyre, there are so many different classes of business in the market at all times that it provides a quick, easy, and handy reference for our office people and salesmen as to their method of soliciting and selling the business that we find in the market.

Q. How did they get along without the document previous to May, 1935?

A. Well, I would say they got along all right, but here is a chance to make it easier for them to get along.

Q. Make it more certain that they are precisely following your announced policy; isn't that correct?

A. Well, I wouldn't say "precisely," but certainly an easy and handy method for them to follow our April 9, 1935, policy.

Q. It makes it more certain for them as well as easier, doesn't it? That is what you mean by the use of the word "easier"?

A. Yes, I think so.

Q. Can you tell me who originated the thought of putting this document in the form in which it now appears?

35401 A. No, sir; I cannot. That is, as to who originated the thought, I don't know.

Q. Can you tell us whose idea it was to line up on the

left-hand column in the page the classes of work, and on the right-hand column the directions as to how to sell it, whether through a dealer or direct?

A. Well, of course, Mr. MacIntyre, I assume that it was done by somebody in our Chicago office. That is the origin of the thought, and I, of course, have seen in the record of this case the testimony of Mr. Scovel that he wrote it. Whether or not he originated the idea, I don't know.

Q. What contribution did you make to the formation of the document?

A. As far as I can remember, I made none.

Q. The suggestions that you made in response to the request of Mr. Rohwer's office did not result in anything?

A. I think I remember that we had no suggestion to make to change the document from that received from Mr. Rohwer's office.

Q. Did any of Mr. E. E. Woods' suggestions appear in this revised form of his statement, such as is shown by Commission's Exhibit 2359-A to F?

A. Well, Mr. MacIntyre, as I told you a few minutes ago, I cannot remember the specific suggestions or the exact conversation that I had with Mr. Woods. As I
35402 remember it, he, himself, made no detailed request as to how business would be sold. He simply said that we could see our way clear to sell more business through or to a dealer than we were doing under our February 21, 1935, policy; so that I cannot give you a specific answer to that question.

Q. When you distributed copies of this document to your salesmen, did you not also distribute copies to Mr. Woods for use by officials of his organization?

A. I think I remember that Mr. Woods got a copy because of his interest in the matter; yes.

Q. What comments—

A. What use he made of it, of course, I have no idea.

Q. Did Mr. Woods make any comments to you on it when you handed it to him?

A. Yes; I remember—well, no, not in connection with that document. I remember, following our April 9, 1935, policy, he was quite pleased.

Q. And this is in conformity with the April 9, 1935, policy?

A. That is right, but I remember no statements in connection with that document itself.

Q. Did you distribute any to any of the dealers—dealer-members of the organization represented by Mr. Woods?

A. Well, of course, I cannot remember the membership of the Southwestern Lumbermen's Association, but I would say we probably did. I think we gave it to two or
35403 three or five customers, and the chances are that they are members, although I am not at all sure about that.

Q. And you just passed them single copies; that is, in four or five instances?

A. Yes.

Q. To what competitors did you pass copies?

A. I gave them to none—nobody.

Q. You had requests from representatives of competitors for them; did you?

A. No; I don't think so.

Q. The distribution of the document that you made to your salesmen was made from your office in Kansas City, was it not?

A. That is correct.

Q. Do you know how many copies of the document were put into mimeographed form by your company?

A. No, sir; I do not.

Q. You do not know whether it was 200 or 2,000?

A. No, sir.

Q. Do you recall how many you received in your Kansas City sales office?

A. No, I do not recall the exact quantity. If you want me to guess, I will guess 25.

Q. How many salesmen do you have working out of that office?

A. We have about thirteen.

Q. Can you account for the other twelve that were received?

35404 A. Well, I am just guessing now on the twenty-five, but I would say that if that quantity is right, and I think it is roughly so, probably six or seven were used in our own office, and, as I testified a minute ago, I think we gave four or five to dealers.

Q. Between the dates of February 21, 1935, and April 9, 1935, did you have a breakdown of similar information on cards or other documents, such as is contained in Commission's Exhibit 2359-A to F?

A. I am sure we did not.

Q. You have used these documents since you have been in the New York office as assistant to Mr. Reiter; have you?

A. Yes; we had occasion to use them very frequently.

Q. How many copies do you have there?

A. Well, I think I have two copies, myself.

Q. What occasion do your salesmen have to use these documents?

A. I don't quite understand that question.

Mr. MacIntyre: Please read the question.

Trial Examiner Norwood: Read it.

(Question read.)

A. Well, if I understand the question, a salesman has occasion to use it—

Mr. Hershberger: Which document are you talking about, please.

35405 The Witness: Commission's Exhibit 2359-A to F, I assume. Is that correct, Mr. MacIntyre?

Mr. MacIntyre: That is correct.

A. Well, I understand your question, a salesman would have occasion to use that document to the extent that he was not sure how we want him to solicit a particular class of business. In other words, as I said earlier, it is a much easier way to follow for actual soliciting purposes by the man in the office or in the field than by our April 9, 1935, policy.

By Mr. MacIntyre:

Q. Suppose one of your salesmen had the duty of soliciting county institutional work purchased by contractor partly outside of cities, towns, and villages, without this document how would you direct him to make that sale?

The Witness: Will you read the question, please, Mr. Reporter.

Trial Examiner Norwood: Read it.

(Question read.)

A. I would tell him to sell that business through a dealer, because the only county business that we sell to a contractor direct is for highway pavements or grade-crossing eliminations, partly or entirely outside of city, town, or village.

By Mr. MacIntyre:

Q. Are your salesmen sufficiently acquainted with your

policy and the refinements of your policy, as stated
35406 in this Commission's Exhibit 2359, to do that in all instances without your instructions, or the use of the document itself?

A. Well, I am not at all sure. I don't know, Mr. MacIntyre. I cannot answer that question. I would say that despite the fact that we are from day to day in the cement business, some of that work is not day to day, and certainly I would be much happier if I had that document at my elbow all the time to be sure that I was correctly following out my company's policy.

Q. How was it possible that you and all of the representatives of your company should quote them following a consistent policy, such as is outlined in Commission's Exhibit 2359, without a statement before you, such as appears there, or some other written record setting forth a statement of such policy?

A. Well, the answer to that, Mr. MacIntyre—first of all, as I told you, we have had variations from all policies, so I would like to modify your word "consistent," and, secondly, prior to the time when we received Commission's Exhibit 2359-A to F, when we had a sales policy such as our February 21st policy, Commission's Exhibit 2480 or 2481, whichever it is, we sent a copy of that copy to the salesmen, with a letter along with it, and, then, of course, if the salesman were at all in doubt as to how to sell any specific work, he would have no hesitancy in calling us and asking us, and, in turn, if we were in doubt I would have no hesitancy in calling the Chicago office and asking for instructions.

35407 Q. Now, referring to Respondents' Exhibit 2480, and calling your attention to item 4 appearing thereon, without further instruction than appears there, how would your salesmen know whether to sell direct or through a dealer, dependent upon whether the purchase was made by owners, cities, or contractors?

Mr. Hershberger: For what kind of work?

Mr. MacIntyre: The item shows.

The Witness: Shall I answer that question of Mr. Hershberger's?

Trial Examiner Norwood: No. Do you want the previous question read?

The Witness: If you please, sir.

Trial Examiner Norwood: Read it.

(Question read.)

By Mr. MacIntyre:

Q. (Continuing.) That is, he had before him no other direction than you have there on Respondents' Exhibit 2480?

A. I think that is obvious. If I had a salesman who was not smart enough to understand that he was at perfect liberty to sell direct for water power or water supply developments, flood control and irrigation projects, except when such work is located entirely within cities, towns, or villages—and I have just read item 4—I should think he was a bit stupid. I think that is obvious on the face of it.

35408 Q. What distinction is made in that particular item as to the nature or type of purchaser?

A. The type of purchaser?

Q. Yes.

A. None. It does not make any difference.

Q. The only difference is as to the location of the work?

A. Sir?

Q. The only difference is as to the location of the work?

A. That is correct, in Respondents' Exhibit 2480.

Q. And does it show any difference as to whether you would sell direct or through a dealer, dependent on whether the work is located within or local to the cities and towns such projects are designed to serve?

A. Well, Mr. MacIntyre, it says very specifically that we will sell direct, except when such work is located entirely within cities, towns, or villages. It makes no classification as to buyer, and there would be, in my opinion, no restriction upon who was buying cement for that particular type of work described in paragraph 4. If it were not entirely inside of the city, town, or village, I certainly cannot see where anybody would be in doubt as to what that meant—that any salesman would be in doubt as to how we expected him to sell that job.

Q. If that is the case, why was it necessary to go into such elaboration as is shown by paragraph 5(1) in

35409 Commission's Exhibit 2359-A to F?

A. Well, Mr. MacIntyre, my answer to that is that Respondents' 2481—

Q. 2480, that is.

A. No; I am talking about 2481, which covers our April 9th policy, and that is a change from Respondents' 2480, our February 21st policy, and Commission's Ex-

ibit 2359-A to F refers to Respondents' 2481 and not 2480.

Q. All right. That is item 5 of Respondents' Exhibit 2481, then, is it not?

A. That is correct.

Q. Covered by less than three lines of matter there, is it not?

A. That is correct.

Q. Then, with respect to Commission's Exhibit 2359, paragraph 5(1) covers the same item, does it not?

A. 5(1) and 5(2).

Q. Why was it necessary to go into such elaboration as to take more than half of a page to state what you had stated in three lines or less, as is shown by Respondents' Exhibit 2481?

A. Well, Mr. MacIntyre, I can only assume. If I am writing instructions, detailed instructions, to my people, I am anxious to make them as clear as I possibly can, and if it takes a page to cover three lines, in my opinion, in order to make it clear, why I would have no hesi-
35410 tancy in so doing, and I am assuming that our people in Chicago, as long as they were sending out a statement of how we were to operate under Respondents' Exhibit 2481, wanted to be sure that we knew exactly every class of business.

Q. There is more likelihood for making a misstatement or being unable to follow your policy of April 9th, without all of this elaboration that I have spoken of; is not that correct?

A. I am sorry, sir, but I am having trouble in hearing.

Trial Examiner Norwood: Read the question.

Mr. MacIntyre: Yes; read the question, please.

(Question read.)

The Witness: Well, I still can't follow that question. I don't understand it.

Trial Examiner Norwood: Read it again.

(Question re-read.)

A. Well, yes, I say that is a fair statement, but again, Mr. MacIntyre, I think our salesmen could understand the policy but simply, as I have said several times before, to make it easier, that document was sent to them.

By Mr. MacIntyre:

Q. It enables them to more easily stay on the lot, so to speak?

A. Well—

Q. That is, not get off the policy; isn't that correct?

A. Yes; I will adopt your latest statement, to
35411 follow the policy.

Q. Can you cite any instance, Mr. Sutherland, where your company sold direct to the Federal Government cement for use on W.P.A. projects other than in the State of North Carolina previous to July 2, 1937, and subsequent to April 9, 1935?

A. Yes, Mr. MacIntyre, we did some to the W.P.A. in—now, did that say emergency relief, your question?

Q. I said W.P.A.

A. All right. W.P.A. in the State of Virginia, beginning in 1935.

Q. What time in '35?

A. Well, I can't remember, but I think it was in the summer of 1935. Likewise, we sold W.P.A. direct in the State of Kentucky, and I am not sure that doesn't go back before 1935. I am sure it was in effect in 1935.

Q. Any other States that you can name in which you did that; that is, North Carolina, Virginia, and Kentucky.

A. Well, my recollection as to date is a bit vague, but I think it comes within the category of the two that you have mentioned, the State of Alabama.

Q. State of Alabama. That is four.

A. Yes.

Q. Any others?

A. I can't think of any right now.

Q. Any in the State of Florida?

35412 A. I don't so remember.

Q. Well, you named four States out of thirty-seven in which you do business; isn't that correct?

A. That is right.

Q. Can you tell us why you didn't do it in the other 33 States?

A. Well, I can't tell you why we didn't do it in the other 33 because on the dates that you mention I was in Kansas City, but I will tell you why we didn't do it in the six States in that territory.

Q. All right.

A. And that was because our April 9, 1935, policy said we would sell such business through a dealer, and we followed that policy.

Q. The policy wasn't made effective in these four States you have named on that date?

A. Well, I think the variation came after the policy, yes.

Q. You can't tell why they singled out these four States in which not to make the policy effective?

A. Well, I have the recollection that we didn't inaugurate the policy, but we found some of this tonnage going into other manufacturers of cement who were bidding direct, and we met that competition.

Q. You were doing, then, what your competitors were doing in the Kansas City district where you operated at that time?

35413 A. We were following strictly our April 9, 1935, policy.

Q. And it was no different from the policies of your competitors, as you recall them; is that correct?

A. Well I, of course, can't remember that definitely, but I don't remember that there were differences specifically enough to recall them to my mind.

Q. Can you state any instances where your competitors' policies differed from yours as announced on April 9, 1935, in any of the 37 States in which you do business?

A. Well, I can't remember specifically the exact wording of any competitors' policies, but one or two maybe, and so I am not sure, and, certainly, I am not sure about 37 States.

Q. As to these policies of your competitors that you have seen, you haven't seen any that are different in any essential details from the policy announced by your company; is that correct?

A. Well, I can't remember, Mr. MacIntyre, as I say, these different policies, but I know of no substantial difference in the territory in which we were—in which I was, but simply I make that statement because in my day-to-day work in the office, if our salesmen had bumped into a departure by a competitor, I would probably have heard about it from my salesmen.

Q. But you can't point out any essential differences in any of the policies as you noted them?

35414 A. No.

Q. You do know as a fact that your competitor salesmen use a bible or a set of instructions such as is shown by Commission's Exhibit 2359-A to F, don't you?

A. No, sir; I don't know that at all. I assume, of course, they have had instructions from their office as we would send instructions, but what they are, I don't know.

Q. Don't you know it is a fact that those salesmen do use such a set of instructions?

A. No.

Q. Mr. Sutherland?

A. No, sir; I don't.

Q. Haven't you been informed by other officials in your company that that was the case?

A. No, sir; I have not.

Q. In your analysis and interpretation of the provisions in Commission's Exhibit 2359, Respondents' Exhibit 2480 and 2481, and Commission's Exhibit 557, with respect to a number of items, you have stated that sales were made through the dealer during the period of the Code and up to April 9, 1935, when the dealer could and did render service and performed functions of a dealer. Do you recall?

A. Well, I adopted that,—I think, perhaps, you refer to the actual terminology in Article XI of Commission's Exhibit 557, in relation, particularly, to water sup-
35415 ply development work, flood control, and irrigation. I can't remember the exact wording, but it is something to the effect "except when dealer service is required." I think.

Q. Yes. And you have stated, of course, that that was the case during the period of the Code and up to and including the period to April 9, 1935?

A. No, that particular statement was applicable only to the period in which Article XI of the N.I.R.A. Code was in force, and for some time, that I can't remember, after its suspension, but, on the other hand, Mr. MacIntyre, that particular terminology or the meaning of it to me was prevalent prior to the N.I.R.A. Code; that is, if a dealer could perform a service for a contractor, the business was sold to him.

Q. Who determined with respect to this period prior to the Code, in such instance, the performing of such functions of a dealer as to entitle him to handle the goods, you or your salesmen?

A. I would say the contractor, probably. In other words—well, maybe the dealer had something to do with it. If the dealer had something to offer the contractor that was worth while, the contractor bought from the dealer.

Q. Of course, you had the contractor contending that he should buy it direct and the dealer contending that he should handle it for the account.

A. No, not on that class of work. I wouldn't say that was true, Mr. MacIntyre, because if, as I said, a
35416 dealer was in position to be of enough help to the contractor doing this water supply, water power, flood control irrigation work to sell himself to the contractor, he got the business, and if he wasn't in such a position, we sold it direct, and I don't remember that the dealer was disappointed about that.

Q. Of course, he couldn't sell the contractor unless you would sell him, could he?

A. I don't follow you on that one.

Q. You say that you would sell him if he were in a position to sell the contractor.

A. Yes.

Q. But if you would sell the contractor at the price equal to that at which you would sell to the dealer, he couldn't be in a position to sell to the contractor; could he?

A. Sure. As I said a minute ago, it all depended on whether the dealer had something that the contractor needed. In other words, in position to render a dealer service, then the contractor buys from that dealer. If the dealer doesn't have anything; then the contractor buys from us.

Trial Examiner Norwood: In such cases would there be a difference in the price?

The Witness: No, we would sell to the contractor at the same price at which we would sell to the dealer.

By Mr. MacIntyre:

Q. Well, prior to 1931 that wasn't the case, was
35417 it, Mr. Sutherland?

A. Prior to 1931? When we sold direct to a contractor? Yes, generally speaking, it was.

Q. He bought it cheaper than he could buy it through a dealer?

A. Well, if you are referring to the times when the so-called trade discounts were in.

Q. Yes.

A. I would modify my answer, of course.

Q. Well, we go back to '31.

A. Yes.

Q. And previous thereto.

A. Yes.

Q. So then you would have contending forces on the

part of the contractor on one side and on the part of the dealer on the other as to whether they should be sold direct or through the dealer.

A. Well, yes, it all depended, as I say, on whether the contractor felt that this dealer had enough to offer him to make it worth while for him to buy it from the dealer.

Q. In such cases where that contention arose, who made the decision as to how the sale was to be made, you or your salesmen?

A. Well, the contractor made it.

Q. No, you are the man making the sale. You
35418 make the decision as to sell him, as to who wants to buy, the contractor or the dealer. Who makes it, you or your salesman?

A. Mr. MacIntyre, the contractors are awarded the job that requires so much cement. If he is going to buy that cement from us and there is no dealer service involved there, we are happy to sell it to him.

Q. Well, the contractor—

A. If the—

Trial Examiner Norwood: I think he is trying to find out where there is a contention as between the contractor and the dealer, each wanting you to sell him, who would decide that.

The Witness: Well, the dealer isn't going to contend that we—

Trial Examiner Norwood: Wait a minute. Just assuming that they did, who would have to make that decision?

Mr. Hershberger: Now, Your Honor, there isn't any proof in the record that there is a dispute, and I think the witness ought to be allowed to answer this. It would seem to me that he was demonstrating that the premise which Mr. MacIntyre is attempting to make isn't the case, and I think that he ought to be permitted to proceed.

Mr. MacIntyre: I disagree with Mr. Hershberger as to what the record shows.

Trial Examiner Norwood: I just thought he could
35419 clarify it if he would just answer my question there.

Mr. Hershberger: The only trouble with that, Your Honor, is that I think your question involves an assumption of the hypothesis which Mr. MacIntyre has made, and which I understand the witness is disputing.

Mr. MacIntyre: I think the witness has adopted it, and I think the record shows that to be a fact.

Trial Examiner Norwood: The assumption that the mill has to decide which one it is going to sell to. I don't think that is unreasonable.

Mr. Hershberger: The witness says it isn't so.

Trial Examiner Norwood: Did cases like that ever occur?

The Witness: Yes; I remember—I can't remember specific jobs—but I can remember jobs, Your Honor, when a dealer had enough sales ability and things to offer a contractor so that he was able to say to that contractor, "Here is what I have," and the contractor said, "All right, I will buy it from you," and we sold the dealer.

Trial Examiner Norwood: You are coming right back into a circle, now. The cases of disagreement as between the dealer and the contractor, that is, of a contention made to you directly by the contractor as to whether you should sell him direct and the dealer, on the other hand, insists that you sell the contractor through him—did you
35420 ever have a case like that?

The Witness: In the period about which we are talking, Your Honor, I remember none. There was no contention. A dealer was perfectly satisfied—or I won't say that. A dealer voiced no objection to us when we sold a contractor directly for such work as we had been talking about, if he, that dealer, had been unable to offer enough to that contractor to merit the business.

By Mr. MacIntyre:

Q. What period are you referring to?

A. Well, I am referring to prior to the Code, N.I.R.A. Code.

35421 Q. I will ask you this, Mr. Sutherland: You do know as a fact that the dealers who handled cement in their re-sale of it to contractors make mark-up of anywhere from 10 to 25 cents per barrel in different localities in the country; don't you?

A. Well, of course, Mr. MacIntyre, a dealer includes a profit for himself if he can get it on anything he sells, and I can remember a dealer asking 10 cents per barrel profit on the sale of our cement; I can remember a dealer asking 25 cents per barrel profit on the sale of our cement.

Q. Now, is it your testimony in the light of that fact that contractors in such instances do not contend
35422 that they should buy the cement from you direct and the dealer contends at the same time that you should sell the cement to him and let him sell it to the contractors?

A. Well, first of all, Mr. MacIntyre, we are talking about a particular class of buyers. We are talking about one—

Trial Examiner Norwood: He is asking you whether or not that is a fact, whether or not that is what you intend to imply by your answers. I think you can answer more directly than going off into an explanation here.

Mr. Hershberger: For the purpose of the record, I would like to state an objection to the instruction given by the Trial Examiner.

Trial Examiner Norwood: Yes.

Mr. Hershberger: In that it is necessary for the witness to explain the type of work which he was describing because it is perfectly obvious that the same answer would not apply to all types of work.

Trial Examiner Norwood: Well, the Counsel has his objection and his exception.

Now, read the question and the witness will give a direct answer.

Mr. Hershberger: I would like the Trial Examiner to instruct the witness to give a direct answer if it can be given; otherwise, to explain the answer.

Trial Examiner Norwood: No. If he can't give a
35423 direct answer, you say so, and then you can explain it later.

(Question read.)

Trial Examiner Norwood: Is that your testimony, or not?

The Witness: No, I don't think I can answer "yes" or "no" to that question. I would like to say, however, and perhaps I can say it in just a few words, that, first of all, we are talking about water supply, water power, floor control, and irrigation work sold to contractors prior to the N.I.R.A. Code. It is my testimony that there were cases where a dealer included a profit in his price of our cement to that contractor and was able to offer that contractor enough service so that the contractor gave the dealer the order. There were also cases where the dealer quoted a contractor, including his desired profit, where he was not able to offer, in the contractor's opinion, sufficient service to sell the job, and the contractor placed the business direct with us. I know, however, of no contention between the contractor and the dealer as to how we would sell the business. My remembrance is that in such

cases where the contractor bought from us because the dealer couldn't sell him sufficient service to warrant his sale of the work, that the dealer voiced no objection to us about it.

35424 By Mr. MacIntyre:

Q. It is your testimony that there has never been a difference of opinion between the dealers and the contractors in such instances that the dealer was rendering a service; that is, it was the dealer's opinion that he was rendering a sufficient service, and it was the opinion of the contractor that he wasn't rendering a sufficient service?

A. I can't remember any in connection with this kind of work, Mr. MacIntyre, no.

Q. In all of the 20 years of your experience in the cement industry, you can't recall such?

A. Not on this particular class of work.

Q. I think the record contains evidences of such instances, Mr. Sutherland.

Showing you Commission's Exhibit 2359-A to F, I ask you if you can point out in it, Mr. Sutherland, any statement of your company's policy to sell any class of work direct that was ever sold through dealers?

A. May I have that question repeated, please?

Trial Examiner Norwood: Read it.

(Question read.)

A. The first one I see, Mr. MacIntyre, is paragraph 5(2)(a)(2), which is large water power, flood control, and irrigation work located entirely or partly outside of cities, towns, or villages. That is the business we have just

35425 been talking about. There were times that we sold, prior to the N.R.A. Code, such business through a dealer when he was able to sell his services to the contractor.

Q. What is the last date on which such policy was used; that is, of selling to a dealer?

A. Well, I think section 11 of the N.I.R.A. Code—

Q. Any other instance in that policy of that character?

A. Let me look a minute. And, of course, that would apply, that work, not only to owners, which is the paragraph I have just described, but also under paragraph 5(2)(b), by cities, towns, or villages, and also 5(2)(c)—no, cut the last one, please. Yes, 5(2)(c)(2), to contractors.

Now, also, Mr. MacIntyre, 7(a), manufacturers of con-

crete and cement products. I testified earlier that the Commission's Exhibit 2359-A to F provides direct or through dealers, and we likewise followed that prior to the N.I.R.A. Code.

Also, on paragraph 7(b) the same thing applies, and so does it on 7(c).

I also testified—

Trial Examiner Norwood: Are you just pointing out these instances covered by the question?

The Witness: Yes, sir.

Mr. MacIntyre: Well, I will state another question.

By Mr. MacIntyre:

35426 Q. Can you point out any instance where you unqualifiedly sold through a dealer cement to any class of work, as to which you provide in Commission's Exhibit 2359-A to F it shall be sold direct?

A. Well, I cannot answer that question "yes" or "no," but I would like to say, and I want again to bring in the point, that prior to the N.R.A. Code, it depended upon whether a dealer was able to sell his merchandise and the service that went along with it. In these cases that I have just been pointing out we sold both direct and through a dealer, depending upon the circumstances involved.

Q. But it was not your policy to unqualifiedly sell through a dealer in those instances?

A. As I have testified, we have had variations from all policies, except Article XI of the Code, Mr. MacIntyre.

Q. Now, can you point out any essential difference in the policy as stated by your company in Respondents' Exhibit 2481, and in Commission's Exhibit 2359-A to F?

A. There is no major difference, Mr. MacIntyre.

Q. Can you point to any difference?

A. Yes.

Q. Any essential difference, I am talking about.

A. Now, I don't know what you mean by "essential," but—

Q. Well, one that would determine whether a sale would be sold through a dealer or direct.

35427 A. Yes; I think this qualifies: Respondents' Exhibit 2481, paragraph 7 provides that we will sell direct to large manufacturers of concrete and cement products, who will consume the cement exclusively in their own operation.

Paragraphs 7(a) and 7(c) of Commission's Exhibit 2359-A to F say we will sell it either direct or to a dealer.

Trial Examiner Norwood: That is a later policy than the one you mentioned first?

The Witness: Your Honor, I think I testified that I consider Commission's Exhibit 2359-A to F a compilation by us of our April 9th policy, which is 2481, Respondents' exhibit.

Trial Examiner Norwood: Which was the later provision; the one to sell direct to the manufacturer, or the provision to sell either to the manufacturer or through a dealer?

The Witness: The choice was later.

Trial Examiner Norwood: Which was the later provision?

The Witness: The choice was later.

Trial Examiner Norwood: All right.

A. (Continuing.) Then, the other one, Mr. MacIntyre, is this one: Respondents' Exhibit 2481, paragraph 5, water supply developments and large water power or flood control irrigation projects. We sell direct, except when it is located entirely within city, town, or village, but—well, I stand on the first answer I made a moment ago.

35428

By Mr. MacIntyre:

Q. That is the only one you can locate?

A. That is the only one I see here; yes.

Q. They are alike in all other essential details?

A. I think so; yes.

Q. Can you name any trade conditions, and describe them, that necessitated, in your opinion, the issuance of and use by your company of the document shown by Commission's Exhibit 2359?

A. No, Mr. MacIntyre. I think that was sent to us simply to aid us in interpreting for all classes of work Respondents' Exhibit 2481.

Q. Is it not a fact, Mr. Sutherland, that during the period between the date on which Article XI was suspended from the N.R.A. Code and the date on which the announcements of your company were made in the first part of 1935, there was indiscriminate selling to different classes of trade by you and your competitors?

A. Well, as to the date, Mr. MacIntyre, I, of course, cannot be specific. I remember that after the suspension

of Article XI from Commission's Exhibit 557, we followed it very carefully for some time. Then, I think it is true that in some respects we began to vary from the pro-
35429 visions of Article XI of Commission's Exhibit 557, just as we varied at times from any policy that we have had.

Q. And have you found that your competitors were also varying from the straight and narrow path?

A. Well, I don't know what you mean by "the straight and narrow path," but if you mean we were varying—

Q. That is, as announced by Article XI?

A. Yes, then they were varying from the provisions of Article XI.

Q. The issuance of your policy as announced on February 21st, as shown by Respondents' Exhibit 2480, did not entirely eliminate all such variances; did it?

A. Well, do you mean, did we vary from the February 21st policy?

Q. To a degree.

A. Yes; we did. I testified we did to all of them, except when Article XI of Commission's Exhibit 557 was in force.

Q. There is less variance by you and your competitors from their announced policies than was the case previous to April 9, 1935, though; is not that the case?

The Witness: I would like to have that question read, please.

Trial Examiner Notwood: Read it.

(Question read.)

A. Well, of course, speaking for our own com-
35430 pany, I will say that I am not at all sure that there is less variance now than there was.

By Mr. MacIntyre:

Q. You would say that there was considerable improvement in the market?

A. What do you mean by "improvement in the market"?

Q. That is, from your company's viewpoint, as to adhering to announced policies by it and its competitors.

A. I don't understand what you mean by "improvement in the market."

Q. I thought I explained it by saying in the adherence to their announced policy.

A. I am sorry; I lost the first part of the question.

Trial Examiner Norwood: Do they adhere to these announced policies better now than they did previously?

The Witness: Do we?

Trial Examiner Norwood: No; the trade generally.

The Witness: Of course, I can speak for my own company only, and I would say that there are just as many variations in our practice of selling cement today under Respondents' Exhibit 2481, as there were under Respondents' 2480, or after the suspension of Article XI of Commission's Exhibit 557.

Trial Examiner Norwood: Is that same condition true with respect to your competitors? Do you know
35431 what they do?

The Witness: Well, generally, Your Honor, in so far as our salesmen report to us, I think the same statement stands.

By Mr. MacIntyre:

Q. I believe you have testified on direct, as well as on cross, that you read the testimony of other witnesses who have appeared in this case concerning this set of instructions as to how to sell cement.

A. You are referring to Commission's Exhibit 2359?

Q. Yes; and similar documents, such as Commission's Exhibit 1905.

A. I don't remember that.

Mr. Hershberger: With respect that, I would like the witness not to answer it unless he knows exactly what that is, and if he does not know what it is, I would like to have it produced, so that he will know.

A. I have no idea—

By Mr. MacIntyre:

Q. Well, he can restrict his answer, then, to—

A. Yes; I testified that I had read the testimony of Mr. Scovel regarding Commission's Exhibit 2359-A to F, and I have read others.

Q. The testimony of others on such documents?

A. On that document.

35432 Q. On that document, and any others that would be a copy of it, of course, would be the same.

A. Yes; a copy of this one.

Mr. MacIntyre: That is all.

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April 2, 1940.

35439 Mr. Hershberger: All right.

Now, the next thing, Your Honor, at the last hearing Counsel for the Commission tendered certain exhibits stated to be an impeachment of the testimony of Benjamin F. Affleck, and other witnesses.

Trial Examiner Norwood: Yes.

Mr. Hershberger: Those exhibits tendered being
35440 Commission's Exhibits, for identification, 3235-A to 3235-Z-114, and 3236-A to 3236-Z-107, for identification, and 3237-A to H.

I would like to state some objections to the receipt of those exhibits on behalf of the Universal-Atlas Cement Company.

Trial Examiner Norwood: Go ahead.

Mr. Hershberger: Universal-Atlas Cement Company objects to the introduction into evidence of Commission's Exhibits 3235-A to 3235-Z-114, for identification, inclusive, and to Commission's Exhibits 3236-A to 3236-Z-107, for identification, inclusive, and to Commission's Exhibits 3237-A to H, for identification, inclusive, and states the following grounds of objection:

Objection 1: Said Exhibits 3235-C to 3235-Z-113, inclusive, and said Exhibits 3236-B to 3236-Z-106, purport on their face to be excerpts from minutes of meetings of Portland Cement Association, for the years 1903 to and including the year 1915. Such exhibits are objectionable because they purport to be mere excerpts from minutes and not complete minutes of the meetings referred to in said exhibits.

Objection 2: There has been no proper foundation laid for the introduction of the excerpts from minutes referred to in the preceding Objection by any showing that
35441 said excerpts are correct and accurate and true transcriptions of the minutes of which they purport to be excerpts.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Hershberger (Continuing): Objection 3: The Portland Cement Association was not in existence during the period covered by the said exhibits, as is shown by the

exhibits, to-wit; 1903 to 1915, inclusive, and, therefore, the minutes show on their face that they cannot be excerpts from minutes of said Portland Cement Association.

Objection 4: Each and every of said exhibits, 3235-A to 3235-Z-114 and 3236-A to 3236-Z-60, is objected to on the ground that each and every one of said exhibits purport to be excerpts from minutes of meetings held prior to the enactment of the Clayton Act and prior to the enactment of the Federal Trade Commission Act and that each of said exhibits purports to be excerpts from minutes of meetings held prior to the enactment of any law under which this proceeding is brought and that, therefore, said exhibits and each of them is incompetent, irrelevant, and immaterial, and that the introduction of same would be prejudicial and inflammatory and could serve no lawful purpose in this proceeding and that the introduction thereof would be only for the purpose of prejudicing the issues in this case against the Respondents by the introduction of material in the form of unsworn excerpts from alleged minutes of alleged meetings, which alleged meetings occurred prior to the enactment of the laws under which this proceeding is brought.

35442

Objection 5: Each and all of said exhibits are further objected to on the ground that no proof has been made of the authenticity of the minutes of the meetings from which said exhibits purport to be excerpts and, therefore, the introduction into evidence of these exhibits would deprive this Respondent of its right to cross-examine the person or persons who wrote the said minutes from which said excerpts appear to have been taken and would, therefore, deny to this Respondent due process of law.

Objection 6: Each and every of said exhibits is further objected to for the reason that each and every of said exhibits has been offered into evidence by Counsel for the Commission as and for evidence to impeach the oral testimony given by Benjamin F. Affleck, a witness called by the Universal-Atlas Cement Company, Respondent in this case. Each and every of said exhibits is objectionable for the reason that no proper basis has been laid for the introduction of said exhibits to impeach the testimony of said Benjamin F. Affleck in that Benjamin F. Affleck was not shown nor confronted with or told by Counsel for the Commission the contents of each and every of said exhibits and was not given an oppor-

35443

tunity while on the witness-stand to admit, deny, or explain any statements in said exhibits upon which Counsel for the Commission might rely for said impeachment, and, furthermore, said exhibits and each of them are objectionable on the ground that Counsel for the Commission has not indicated which of said exhibits is offered for the purpose of impeaching the oral testimony of said Benjamin F. Affleck, and said exhibits and each of them are further objectionable because Counsel for the Commission has stated that the purpose of the introduction is to impeach the oral testimony of said Benjamin F. Affleck, but Counsel for the Commission has not followed the rules of law applicable to the presentation of impeachment material, nor has Counsel for the Commission followed the rules of law applicable to impeachment proceedings in its offer of said exhibits and each of them.

Objection 7:—

And I will be through soon, Your Honor.

Trial Examiner Norwood: Yes.

Mr. Hershberger: —It appears from examination of said exhibits that Benjamin F. Affleck is mentioned or referred to in the following exhibits only, to-wit: 3235-35444 Z-25; 3235-Z-104; 3236-W, X, Y; 3236-Z-9, 10, 11, 12; 3236-Z-43, 44, 45; 3236-Z-55, 56; 3236-Z-69, 70, 71, 72, 73; and 3236-Z-104. As to each and every of said exhibits other than those hereinbefore immediately mentioned, Universal-Atlas Cement Company further objects because the said witness, Benjamin F. Affleck, is neither mentioned nor referred to in any manner whatever, and said exhibits are therefore incompetent, irrelevant, and immaterial for the purpose of impeaching the oral testimony of said Benjamin F. Affleck. Furthermore, said exhibits immediately heretofore mentioned which either refer to the said Benjamin F. Affleck or which purport to be statements of the said Benjamin F. Affleck, appear by an examination thereof to be entirely incompetent, irrelevant, and immaterial to any of the issues in this case and do not purport to contradict in any way the oral testimony given by the said Benjamin F. Affleck in this case, and, therefore, each and every of said exhibits specifically mentioned in this objection are incompetent, irrelevant, and immaterial.

Objection 8: Universal-Atlas Cement Company further objects to the introduction of each and every of said ex-

hibits on the ground that the introduction thereof would violate the best evidence rule in that there has been no showing of inability on the part of the Commission
35445 to produce the original minutes from which these exhibits purport to be mere partial excerpts.

Objection 9: Universal-Atlas Cement Company further objects to the introduction in evidence of each and every of said exhibits on the ground that said exhibits purport to be excerpts from minutes of meetings from the years 1903 to 1915, inclusive, and are, therefore, too remote in point of time to be relevant or material to the issues in this case.

Now, I presume, of course, that Your Honor will want to examine the particular exhibits before any ruling can be made, and I might say, in that connection, that in support of these objections which I have read, that I have a number of cases which I will be glad to submit to Your Honor at such time as you want to give consideration to them.

Trial Examiner Norwood: Yes.

Mr. Hershberger: Perhaps it will be a day or two before you can get at them; I do not know.

Trial Examiner Norwood: If you will hand them to me—

Mr. Hershberger: So, whenever you want them, I will give you a copy of the cases, if you will ask me, upon which I rely as to my objections.

Trial Examiner Norwood: All right.

35446 Mr. Brick: I would like to state objections, Your Honor please, on behalf of the Respondents other than the Universal-Atlas Cement Company.

Trial Examiner Norwood: Yes.

Mr. Brick: These are objections directed to Commission's Exhibits, for identification, 3235-A to Z-114; 3236-A to Z-107, and 3237-A to H, inclusive.

The Respondents object to each of these exhibits, and to each and every part thereof, on the grounds that they are incompetent, irrelevant, immaterial, and prejudicial. They have no probative value as to any of the issues raised by the pleadings or by the proof.

Now, with respect to specific objections, the first two named exhibits are purported to be piecemeal excerpts taken from copies of the minutes of meetings of the Association of American Portland Cement Manufacturers. That is an organization—

Trial Examiner Norwood (Interposing): Off the
35447 record just a moment.

(There was a discussion off the record.)

Mr. MacIntyre: —since we are just coming back on the record, I would like to make a suggestion, and that is that since there is a stipulation in the record to the effect that all Respondents' Counsel have the advantage of objections made by any one of Respondents' Counsel, that in so far as the Counsel now making objections to pending exhibits that they be confined to objections not already covered by his associated counsel.

Trial Examiner Norwood: The point is well taken, and I will ask Counsel to conform to that suggestion in so far as he can.

Go ahead.

Mr. Brick: Yes. I expect that the other Respondents will have the benefit of the objections stated by Mr.
35448 Hershberger on behalf of Universal-Atlas Cement Company, and, in addition to those objections, I wish to continue with the objection made in the record by the other companies.

Trial Examiner Norwood: Well, I will ask Counsel not to duplicate.

Go ahead.

Will the Reporter please read the last part of the statement made by Mr. Brick.

(Record read as follows:

"Now, with respect to specific objections, the first two named exhibits are purported to be piece-meal excerpts taken from copies of the minutes of meetings of the Association of American Portland Cement Manufacturers. That is an organization—".)

Mr. Brick: This is an organization which is not a Respondent and is not in any way referred to in the allegations of the complaint.

It appears that the meetings were held between 1903 and 1915, and that during the trial of a case known as United States against Cement Manufacturers Protective Association, the attorneys engaged in the presentation of evidence in connection with that prosecution examined copies of minutes of meetings of this particular Association, and had excerpts prepared therefrom.

35449 That particular case to which I made reference was reported by the Supreme Court in 268 U. S. It

appears that Counsel for the Commission obtained these particular documents from files of the Department of Justice and attempted to prove them—

Trial Examiner Norwood (Interposing): Now, Counsel—

Mr. Brick (Continuing): —through the hearsay—

Trial Examiner Norwood (Interposing): Wait a moment. That is all in the record, and we know all about it. I have just read every word in the record, and I noted the pages there on that exhibit, and the counsel will not have to do that. Let him state his legal grounds of objection and save his argument for the Commission.

Mr. Brick: Well, now, if Your Honor please, I think it will be an important thing for me to state the position of the Respondents so that Your Honor will be advised of our objections, and the argument which we might have in support of them.

Trial Examiner Norwood: How many pages is that written objection there?

Mr. Brick (Referring to papers in hand): I have several pages of notes, and I imagine, without any additional interruption, either from Counsel or from the Commission or from the Trial Examiner, I could conclude in between 10 and 15 minutes. I think I would have finished by 35450 now if I had not been interrupted.

Trial Examiner Norwood: Well, I am asking counsel not to duplicate.

Mr. Brick: As I understand it, you are asking me not to state objections—

Trial Examiner Norwood: I want—

Mr. Brick: I am stating objections—

Trial Examiner Norwod: I want you to state your legal grounds of objection. They have already been fully stated by one of counsel, and counsel appears to be going over the same ground except he is adding repetitions of the evidence—

Mr. Brick: Well, these documents—

Trial Examiner Norwood: —from the record.

Mr. Brick: Your Honor please—

Trial Examiner Norwood: Now, I don't want you to waste—

Mr. Brick: —are such legal—

Trial Examiner Norwood: Wait a moment.

I do not want you to waste your time on that sort of

thing. If you have them in typewritten form I will take that and examine it and put it in the record without wasting this time.

Mr. Brick: Well, I do not propose—

Trial Examiner Norwood: And I have a right to
35451 require that of you.

Mr. Brick: These are only loose notes. This is to some extent extemporaneous.

Trial Examiner Norwood: Yes.

Mr. Brick: I will let you see them in the form they are.

Trial Examiner Norwood: If it is in a form to be handed to the Reporter?—

Mr. Brick: Well, they are not.

Trial Examiner Norwood: —it is another matter.

Mr. Brick: These documents, I think, come so far away from any possibility of their being admissible, I think that Your Honor should be fully advised with regard to the position of the Respondents concerning them.

Trial Examiner Norwood: Go ahead.

Mr. Brick: I think I stated that the record shows that Counsel for the Commission obtained these particular documents from the files of the Department of Justice, and that it also shows that Counsel for the Commission attempted to prove them through hearsay testimony of one of the three men who had the excerpts prepared. They were not previously referred to in this case, and the record of the Cement Manufacturers Protective Association case, of which I think Your Honor may take judicial notice, makes
no reference to any of the matters contained in these
35452 proposed exhibits.

Now, at the time Counsel for the Commission attempted to prove these documents, which was several months ago, counsel stated that the documents were to be used in connection with the cross-examination of witnesses appearing on behalf of Respondents. Now, Counsel for the Commission has now, however, offered these documents in evidence.

Mr. Brick: All right.

No additional effort has been made, the record shows, to prove the exhibits, and they are just as inadmissible now as they were immediately after the attempt was made to prove them. At that time I think the record shows that counsel indicated that he did not intend to offer them, and

nothing had happened with regard to the exhibits between that time and the time when they were offered, a week or ten days ago.

Now, with reference to the exhibits, for identification, Commission's 3235 and 3236, Counsel for the Commission has filed to lay a proper foundation.

35453 If Your Honor will recall, the above offer was said to consist of excerpts to be taken from copies of minutes of meetings. There has been no proof, no authentication of the so-called minutes from which the Witness Kemp, or any other witness, could have proved the facts contained therein.

It is well established that in connection with the offer of minutes of meetings, the offering party must prove and authenticate the minutes by calling the person or persons who took down the minutes to testify to that effect, and to vouch for the accuracy of the transcription. These requisites have been entirely disregarded, although the situation involved here demands more than the usual safeguard, because the offer does not purport to include the minutes of meetings but only excerpts from copies of alleged minutes of meetings of an organization which is not a party to the proceeding.

Now, great care should be exercised, we believe, in this particular matter, also because the purpose of the pending offer is to prove alleged statements ascribed to certain named individuals, and the conclusions of the unknown persons who reported the meetings. These conclusions relate to discussions and actions which are purported to have taken place in the course of the meetings.

35454 Your Honor, I believe, will appreciate that Commission's Exhibits, for identification, 3237-A to H, can in no way prove the offer. The excerpts, in law and in fact, are totally unauthenticated, and incompetent; in the present state of the record; in other words, none of the declarations contained in the various excerpts have been proved.

Now—

Trial Examiner Norwood: Haven't they been shown to be copies of the minutes of this Association?

Mr. Brick: No, sir.

First of all, there is no proof that there were any minutes. That is entirely hearsay.

As I see the situation, we have two types of hearsay

with regard to the proposed offer: You have the hearsay with respect to the statements which are sought to be proved as declarations binding as against some Respondents—I don't know which ones, but some—

Trial Examiner Norwood: Yes.

Mr. Brick: —and then you have a hearsay, Your Honor please, with regard to the manner in which they try to prove that the statements were made.

Trial Examiner Norwood: Well, now, does Counsel contend that what he is doing there is a statement of lawful grounds of objection, or is he arguing the case?

Mr. Brick: Well, Your Honor please, in my mind there is no doubt on it at all. I am stating objections.

35455 Trial Examiner Norwood: Yes.

Mr. Brick: And pointing out the illegality of the offer.

Trial Examiner Norwood: Arguing them along with the statement.

Mr. Brick: Well, I am trying to make our position clear to you.

Trial Examiner Norwood: Yes. I will ask counsel to state his legal grounds for objection and discontinue the argument. He has a chance to argue this in his brief and and orally before the Commission.

Mr. Brick: Well, with regard to that remark, Your Honor please—

Trial Examiner Norwood: You submit to me—

Mr. Brick (Continuing): —I don't like to discuss these things, they don't relate to the merits of the case—

Trial Examiner Norwood: Yes.

Mr. Brick: —but as far as this general practice of Your Honor not being interested in the argument, or the weight of what we might have to say with regard to the objections, I think is most prejudicial with respect to the Respondents, for this reason—

Trial Examiner Norwood: That is an assumption on your part that is not true at all. I—

35456 Mr. Brick: Will you let me state the reasons, and I think you will—

Trial Examiner Norwood: You are taking time here; you are duplicating another objection which has already been made, and you are insisting on violating the rules of the Commission by arguing your points along with your statements of objections.

Mr. Brick: I don't understand—

Trial Examiner Norwood: I can refer to the record just as well as you can. You can refer me to the record; you can cite me cases, or anything, but I ask counsel now not to continue to enlarge on his objections and to introduce argument there. This is not the time for argument. We are making a record here, and receiving evidence.

Mr. Brick: I grant Your Honor you are receiving Government evidence—

Trial Examiner Norwood: Yes.

Mr. Brick: —but we want to object to that.

Trial Examiner Norwood: I understand (bringing down gavel).

Now, state your legal grounds of objection, now, and I will pass over your insinuations.

Mr. Brick: If you would let me state the reason—

Trial Examiner Norwood: Yes.

35457 Mr. Brick: —Before you cut me off, I don't think you would have any objection—

Trial Examiner Norwood: Go ahead.

Mr. Brick: —to what I was going to say.

Trial Examiner Norwood: Go ahead.

Mr. Brick: I think it is self-evident.

Trial Examiner Norwood: Go ahead.

Mr. Brick: Will the Reporter read my last statement where I left off?

Trial Examiner Norwood: Read it.

(Record read as follows:

"Your Honor, I believe, will appreciate that Commission's Exhibits, for identification, 3237-A to H can in no way prove the offer, the excerpts in law and in fact are totally unauthenticated and incompetent in the present state of the record; in other words, none of the declarations contained in the various excerpts have been proven.")

Mr. Brick: In connection with the two exhibits, Your Honor please, Commission's Exhibits, for identification, 3235 and 3236, they were offered to impeach the testimony of the witness Affleck, and other unnamed witnesses who preceded him. Your Honor will recall that a prerequisite of using statements or documents to impeach a witness is clear and readily apparent inconsistencies.

35458 Now, I have an extract here from Wigmore directly on the point. With Your Honor's permission, I would like to refer to it.

Trial Examiner Norwood: I shall hear nothing further on this except the statement of your legal grounds of objection to receiving those exhibits.

Mr. Brick: All right, sir.

Trial Examiner Norwood: Now, if Counsel will submit full and complete remarks about that in the form of a brief, I shal receive it, and will you kindly give a copy to the other side.

Mr. Brick: Surely.

Trial Examiner Norwood: I shal be glad to receive and consider it, and I assure the Counsel I shall study all the points that have been raised here before I rule on receiving the testimony, but I think we are wasting time now—

Mr. Brick: May I continue?

Trial Examiner Norwood: —by arguing on the record.

Mr. Brick: May I continue with my objection?

Trial Examiner Norwood: I think not. I have asked counsel to confine himself to a legal statement, and he has not done it.

Now, if you will submit—

Mr. Brick: Now, I do not like to have any contro-
35459 versy with Your Honor over a simple matter—

Trial Examiner Norwood: There is no controversy.

Mr. Brick: —as to—

Trial Examiner Norwood: But the matter is closed.

Mr. Brick: Well—

Trial Examiner Norwood: Call your witness.

Mr. Brick: If Your Honor please, I wish to have—with Your Honor's permission, of course—the record show—

Trial Examiner Norwood: The record shows what it shows.

Leave that off.

Call your witness.

Mr. Brick: Leave what off, Your Honor please?

Trial Examiner Norwood: Those last remarks.

Call your witness.

Mr. Wooden: Your Honor—

Trial Examiner Norwood: You can state any further objection in writing; I will receive them.

Mr. Wooden: Unless there is some point of fact on which Your Honor desires elucidation, there is nothing that I care to say in response to objections made. I think

all of the factual features underlying the offer and preceding the offer of these exhibits is a matter of record.

I would just like to say this: If the objection is that these are excerpts, why, we would be very glad to
35460 have the original and complete set of the exhibits which presumably are in the possession of the Respondents.

Trial Examiner Norwood: I will receive any further written objections, or briefs, or written argument, and promise to counsel that I will study them carefully before making a ruling.

Mr. Brick: If Your Honor please—

Trial Examiner Norwood: So do not take further time.

Mr. Brick: Your Honor please—

Trial Examiner Norwood (Bringing down gavel twice): wait a moment.

Mr. Brick: Well, off the record. I do not care.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

C. H. BOICE, being called as a witness for Respondents, and being first duly sworn, testified as follows:

Direct Examination by Mr. Hershberger.

35461 I am sales manager of the Universal Atlas Cement Company located at Waco, Texas, where I live. We handle some business from some of the other mills of Universal Atlas, but I am not sales manager for those mills. In other words, my duties are primarily confined to the selling of the product produced at the mill at Waco, Texas. I have been sales manager since 1934; but I have been with the mill at Waco, Texas, ever since it was built. The mill was started in 1928 and completed in 1929.

Q. (Indicating) I show you, Mr. Boice, an exhibit heretofore introduced by the Universal-Atlas Cement Company, and which is marked "Respondents' Exhibit 2469,"
35462 and ask you whether you have seen that exhibit, or copy of it, before?

A. Yes, sir.

Q. (Indicating) And I also show you a copy of Respondents' Exhibit 2468-A to R, being a list of neutral freight rate points in Texas, which was heretofore intro-

duced by the Respondent, and asked you whether you have seen that list, or a copy of that particular document?

A. I have.

Q. Now, Mr. Boice, I would like to ask you whether you had anything to do with that map, or with the list of neutral points which I have just shown you (indicating document)? If you did, tell us what you did?

A. I did, and we prepared a complete analysis of our shipments in accordance with this map by zones, and to neutral points.

Q. Now, do you mean by that that you determined the shipments made by your company to each of the zones, as is shown by different colors upon map-marked "Respondents' Exhibit 2469" (indicating)?

A. Yes.

Q. And for what period of time did you do that?

A. From July 1, 1929, through June 30, 1939.

Mr. Hershberger: Will you please mark this for identification.

35463 The Reporter: Your Honor, this document is marked for identification "Respondents' 2533."

(The document was marked for identification "Respondents' Exhibit 2533.")

By Mr. Hershberger:

Q. I show you now Respondents' Exhibit, for identification, 2533 (indicating); I will ask you to state what that is.

A. That is a statement I prepared showing the distribution of these shipments by zones, in accordance with this map (indicating).

Q. That is Respondents' Exhibit 2469?

A. Yes.

Q. And does Respondents' Exhibit 2533 shows the shipments for the period that you mention; that is, July 1, 1929, to June 30, 1939?

A. It does.

Q. And does it show separately the shipments for each year of that period of time?

A. Yes.

Q. And does it show separately the shipments into the zone colored green upon Respondents' Exhibit 2469 (indicating)?

A. It does.

Q. And does it show separately for each of the years

mentioned the shipments by your company into the zone colored purple, upon the map, Respondents' Exhibit 2469 (indicating)?

35464 A. It does.

Q. And with respect to each of the other colored zones, does Respondents' Exhibit for identification 2533 show separately, by years, for the period mentioned by you, the shipments made by your mill at Waco, Texas, to the various zones shown on the map which is numbered Respondents' Exhibit 2469 (indicating)?

A. It does.

Q. Just explain how you went about making up the tabulation which is marked "Respondents' Exhibit 2533," for identification?

A. When we ship a car of cement a record is made on our shipping card for each shipping point where we have a customer, and we compiled these figures from those—or from that record of shipments.

Q. Those are cards that you speak of being original records in your office in Waco, Texas?

A. Yes, sir.

Q. Do I understand you to indicate that every time a shipment is made an entry is made upon the card?

A. That is right.

Q. And the total shipments shown on the tabulation, Respondents' Exhibit 2533, for identification, was made by adding up the figures shown on the cards for the various zones; is that correct?

A. That is right.

35465 Q. Now, the tabulation, Respondents' Exhibit 2533, for identification, does not show shipments—or does it—to the points shown on the neutral freight point list, which was marked "Respondents' Exhibit 2468-A to R" (indicating)?

A. No, it does not. We prepared other figures which show the shipments to the neutral points.

Mr. Hershberger: I would like to offer this Respondents' Exhibit 2533, for identification, into evidence (handing document to Mr. Paulson).

35466 (RESP. EX. 2533, was offered and received in evidence.)

By Mr. Hershberger:

Q. Now, I would like to have you explain a little of the detail on that Respondents' Exhibit 2533, Mr. Boice (indicating).

I note, for example, in the column at the left are listed the names "Ada" and under it "Dallas" and under it "El Paso," and under that "Fort Worth," and some subsequent data under that (indicating). What do those names indicate?

A. The Ada zone indicates that all shipments into this —(indicating)—

Q. Here?

A. What color is that,—blue (indicating)?

Q. Yes.

A. (Continuing) This blue section up in the northeast section of the Panhandle (indicating on map).

Q. You are talking now of the section colored blue on Respondents' Exhibit 2469 (indicating)?

35467 A. Yes.

Q. What does the word "Dallas" in the first column under "Ada" indicate?

A. That indicates shipments into this (indicating)—

Q. Brown?

A. —brown area.

Q. On Respondents' Exhibit 2469?

A. Yes.

Q. And one more question: Take El Paso, which appears under the word "Dallas," what does that indicate?

A. That indicates shipments to this area out here, in the far west Texas (indicating).

Q. That is colored?

A. Pink.

Q. Red?

A. Pink or red,—I don't know whether you call that red or pink.

Q. Well, all right.

And the other names appearing in the first column, identify in the same way the areas in the Respondents' Exhibit 2469; is that correct?

A. That is correct.

Q. Now, take the second column at the top of which appears the designation. "7-1-12-31-1929." Does that mean that the figures in that column cover the period from

35468 July 1 to December 31, 1929?

A. Yes.

Q. And in that column opposite "Ada" there appear to be three figures. The first figure is "264"; under that is the figure "792"; and under that is the figure "1056." Now, please explain those three figures.

A. The figure "264" indicates shipments to split counties.

Q. Just what do you mean by "split counties"?

A. That is where the line of demarcation comes through the county.

Q. Do you mean by that—

A. And where the freight rate from one mill as against another divides, or where they equal, rather.

Q. Well, do you mean by "split county," the county shown on the map, Respondents' Exhibit 2469, a part of which county is in one zone and a part of which county is in another zone?

A. That is right.

Q. So that the figure "264" opposite the column designated "Ada," refers to the shipments from July 1 to December 31, 1929, into counties that are in the Ada zone colored blue upon the map, and part of which counties are in another zone?

A. That is correct.

Q. Now, what does the next figure "792," which appears under the "264," mean?

A. The figure "792" means shipments for that 35469 year into a whole county, in the Ada zone.

Q. By illustration, for example, would Roberts County—

A. Yes.

Q. —be a whole county in the Ada zone?

A. Yes, sir; and also Wheeler County.

Q. Yes. And then what does the third figure below those we have just mentioned indicate, "1056"?

A. That is simply the total of the two other figures.

Q. In other words, the "1056" is an addition of the figures "264" and "792," and "1056" represents the total shipments for the period mentioned in 1929 into the Ada zone?

A. That is right.

Q. Now, I will ask you whether this entire tabulation was made up in the same way with respect to each of the other zones mentioned?

A. It is.

Q. Each year being shown separately?

A. Yes.

Mr. Hershberger: Off the record?

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Mr. Hershberger: On the record again, please.

Trial Examiner Norwood: Yes. Go ahead.

By Mr. Hershberger:

Q. Explain, please, Mr. Boice, if you will, what
35470 do you mean by Ada zone?

A. Those points in those counties outlined to which the lowest freight rates available are from Ada, Oklahoma.

Q. What, for example, do you mean by the Waco zone, which is colored purple on the map, Respondents' Exhibit 2469, and which appears as the last named zone in column 1 in Respondents' Exhibit 2533? What does the Waco zone mean?

A. All points to which Waco has the lowest freight rate.

Q. And those would all be within the purple area on the map (indicating)?

A. Yes.

Q. That is true, of course, for each of the other zones with the same way?

A. Yes.

Q. I notice on one of these zones that is shown on Exhibit 2533 that there seem to be no figures opposite the zone Gas Belt. What does that mean?

A. It means we had no shipments there from the Waco mill.

Q. And that refers to the zone colored pink in the upper—

A. Well, those two counties are parts of counties up there (indicating).

Q. In the upper Panhandle (referring to map)?

(Witness makes no response.)

Q. Lipscomb County?

A. And Ochiltree.

35471 Q. Ochiltree? O-c-h-i-l-t-r-e-e?

A. Yes.

Q. Those figures that I have shown on Respondents' Exhibit 2533, are all shipments from your mill at Waco, are they not?

A. Yes, sir.

Mr. Hershberger: Will you mark this for identification, please?

The Reporter: Your Honor, these are marked for identification "Respondents' Exhibits 2534-A, B, and C."

(The documents were marked for identification "Respondents' Exhibits 2534-A, 2534-B, and 2534-C.")

By Mr. Hershberger:

Q. I show you Respondents' Exhibits, for identification, 2534-A, B, and C (indicating); I ask you to state whether you made that, and if so, what it is?

A. I made it, and it is a complete list of our shipments from the Waco mill to neutral freight rate points in Texas, from July 1, 1929, to June 30, 1939.

Q. And does it show shipments in barrels?

A. Yes.

Q. And it shows the shipments in barrels for each year separately, does it?

A. Yes.

Q. And to each station there as indicated on the
35472 lefthand column of the exhibit?

A. Yes.

Q. Let me ask you, Mr. Boice, whether the stations shown on Respondents' Exhibit, for identification, 2534-A, B, and C, are the same stations as are shown on Respondents' Exhibit 2468-A to R?

A. Yes, except we did not include such stations to which we had no shipments.

Q. In other words, Respondents' Exhibit 2534-A to C included all of the stations shown on Respondents' Exhibit 2468-A to R to which you made shipments?

A. That is correct.

Mr. Hershberger: I will offer Respondents' Exhibit 2534-A to C for the record (showing document to Commission's counsel).

35475 (RESP. EX. 2534-A, 2534-B, and 2534-C was offered and received in evidence.)

By Mr. Hershberger:

Q. Mr. Boice, in preparing Respondents' Exhibit 2534-A to C, did you do that in the same manner—that is, by reference to the original card records in your office, and picking out the towns shown in the lefthand column, in determining the shipments in barrels that went to each of those towns?

A. Yes, we did it in exactly the same way we made the other statement.

Q. Yes, I see, and you supervised this and did most of it yourself, naturally, in the office, did you not?

A. I did.

Q. Now, at the bottom of page 2534-C (referring to Respondents' Exhibit 2534-A to C) appear figures opposite the word "Totals." I assume that is perfectly clear, that it means that the figures shown in the columns are
35476 the totals of the shipments to all neutral points in Texas for the year of the respective columns?

A. They are.

Q. For example, the total shipments which you made to all neutral freight rate points in Texas for the period July 1 to December 31, 1929, was 14,150 barrels; is that right?

A. For that period, that is correct.

Q. And during the year 1930, the total shipments that your company made from your Waco mill to neutral freight rate points in the State of Texas was 52,140½ barrels?

A. That is correct.

Q. I notice that the figures in the total fluctuate or vary quite considerably in amount, Mr. Boice. For example, in the year 1931 it appears that you shipped 118,362½ barrels to neutral points, and in the year 1937 you shipped 82,923½ barrels, and the other years vary very considerably. Can you explain the variance in those figures?

A. Well, that is because the cement business moves around.

Q. In other words—

A. You don't have it in the same place all the time. There may be business at one locality this year, and next year not be any business there.

Q. Is that same statement true with respect to the zones, generally, as distinguished from the neutral freight points?

A. Yes.

35477 Q. And does Respondents' Exhibit 2533 indicate that by the figures in the bottom row opposite the word "total"?

A. I think it does; decidedly so.

Q. Now, the shipments of cement which you made to the neutral points shown on Respondents' Exhibit 2534-A to C, were again standard cements, the same as were covered by Respondents' Exhibit 2533?

A. Oh, yes.

Trial Examiner Norwood: Do the conditions reflected by this evidence obtain with respect to all mills?

The Witness: (No response.)

Trial Examiner Norwood: Isn't this generally true?

Mr. Hershberger: I should think so. We might ask Mr. Boice a question along that line.

Trial Examiner Norwood: Yes.

By Mr. Hershberger:

Q. Mr. Boice, have you had experience in the cement business other than at Waco, Texas?

A. Yes.

Q. Where else have you been in charge of selling cement?

A. Kansas City, Mo.; Omaha, Nebr.

Q. How many years have you been in the cement business?

A. Twenty-four years.

Q. Would you say from your experience in the other locations that you have mentioned that the fluctua-
35478 tions in demands for cement which are shown by the exhibits introduced into evidence, to be true with respect to the State of Texas, are also true in regard to the other territories in which you engaged in the cement business?

A. I think that has been quite generally true in my experience in any and all territories that I have worked in.

Mr. Paulson: I do not think that that clarified Your Honor's point, did it? I do not understand that that map, or those exhibits, are offered to show fluctuations in demand.

Mr. Hershberger: Oh, yes.

Mr. Paulson: I understood—

Mr. Hershberger: As well as what that actual demand is.

Trial Examiner Norwood: I was satisfied with the answer, but counsel may ask him further on that on cross-examination.

Mr. Paulson: Well, I thought Your Honor put an interesting question on a very important question, but I did not think that the answer brought forth the answer and solved the difficulty.

Trial Examiner Norwood: You may bring it out.

Mr. Paulson: In other words, it seems to me it is a localized situation that cannot be received generally in this case.

35479 Trial Examiner Norwood: That may appear later.

Take five minutes' recess.

(There was a short recess taken.)

Trial Examiner Norwood: Proceed.

By Mr. Hershberger:

Q. I show you, Mr. Boice, a map, which was introduced by the Respondent, the Universal-Atlas Cement Company, as Respondents' Exhibit 2471 (indicating), supplemental to the other map which you talked about before in your testimony, but which is a neutral price point map as distinguished from the neutral freight point map, which was Respondents' Exhibit 2469, and I will ask you to state whether you prepared figures showing your shipments with respect to the neutral price point map?

A. I started to, but never completed them.

Q. What was the occasion for starting to prepare those figures?

A. I was asked to do so by our counsel in connection with a case in Texas.

Q. And you never finished those figures?

A. No, sir.

Mr. Hershberger: That is all, Your Honor.

Trial Examiner Norwood: Cross-examine him.

Cross-Examination by Mr. Paulson.

Q. Did you prepare any of these other exhibits 35480 that are before you there, Mr. Boice, for the Texas suit?

A. Yes.

Q. All of that neutral freight zone map, Respondents' Exhibit 2469, and supporting data?

A. Yes, I am sure that was the original purpose.

Q. In the sale of cement in Texas, Mr. Boice—let me say this: Have you during the last 10 years sold on a base point price plus freight?

A. We sell on delivered prices.

Q. And calculate those by taking the lowest combination of base point price plus freight?

A. Yes.

Q. How many base points are there in Texas?

A. I think six.

Q. Now, Respondents' Exhibit 2469, which is the neutral freight zone map, is a graphic showing of how your company has distributed cement in the past 10 years, is it not?

A. I don't believe I got the first part of your statement, please?

Mr. Paulson: Will you read it, please?

(Last question read by Reporter.)

A. Yes, from our Waco mill.

By Mr. Paulson:

Q. That is, would you have to take into consideration—

Mr. Hershberger: Waco.

35481 By Mr. Paulson:

Q. From the Waco mill, did you say?

A. Yes.

Q. Is that the only mill you have in Texas?

A. Yes.

Q. Would you have to take into consideration Respondents' Exhibit 2533 and Respondents' Exhibit 2534 in making that map, which is 2469, the graphic showing you talked about, or is it by itself sufficient—

A. Oh.

Q. Does it by itself show how cement was distributed?

A. It shows how cement was distributed from our mill at Waco.

Q. Well, you cannot fix the boundaries like you have done there for a 10-year period, can you, Mr. Boice, in view of the fact that freight rates change, and also basing-point prices change?

Mr. Hershberger: I think you are confused somewhat by talking about several different things.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Paulson:

Q. Do you have my last question?

A. I do not believe I do, Mr Paulson.

35482 Q. Well, I notice that Respondents' Exhibit 2469, which is the map, neutral freight zone map there (indicating)—

A. Yes.

Q. —is colored, and there are fixed boundaries around the colored areas (indicating).

A. Yes.

Q. Now, for a 10-year period those colored areas with those boundaries there do not accurately represent how cement was distributed, do they?

A. (Witness makes no response.)

Q. Aren't they an average, or something?

A. (Witness indicates.) Well, of course the neutral lines were prepared on the basis of freight rates in effect as of at the time the map was prepared; however, I don't recall any particular change in freight rates over quite a period of years.

Q. Now, had there been a change in freight rates, say, in 1935, it would not accurately and graphically portray how your cement had been distributed as of the period prior to that, would it?

A. Well, as to that, if there had been a drastic change in freight rates, it might have made some difference in some years, of course.

Q. Take a look at Respondents' Exhibit 2471, Mr. Boice, please (indicating).

35483 Mr. Hershberger: Is that the other map here?

Mr. Paulson: Yes, the other map.

Mr. Hershberger: I think this is it (indicating). Yes. Let me put that number on it here.

Mr. Paulson: All right.

Mr. Hershberger (indicating): That is the other number.

By Mr. Paulson:

Q. Now, this purports to be a neutral price point map of Texas (indicating). Now, as of what date is that a neutral price point map?

A. Well, it was prepared about July, 1939, I would say as of that date.

Q. And it may not be, and it would not be an accurate map as of any time prior thereto, or after that date, had there been a change in the base point price?

A. That would change it, of course.

Q. Yes. In other words, it is a map which is accurate as of the date it was prepared, and not necessarily as of any other time, isn't that true?

A. I would assume that, yes.

Q. A base price change in Oklahoma, for instance, would change that map, would it not?

A. It might. I don't know until I would know what the change amounted to.

35484 Trial Examiner Norwood: Well, what change will be necessary to require a change in the conditions which the map shows?

Mr. Paulson: I wish the witness would follow that now, and in line with that I would suggest that if there is a

change in the base point at Ada, Okla., for instance, this colored area on here representing sales made on the Ada base would be either enlarged or diminished, depending upon the change in the Ada base.

The Witness: It wouldn't make any difference in this map, however.

By Mr. Paulson:

Q. Well, there is no "Ada" on this map (indicating).

A. Ada makes no prices in Texas.

Q. I see.

Well, had there been a change in base prices at Waco? Is there a base point there?

A. Yes.

Q. Had there been a change upward in the Waco base?

Q. The colored area surrounding Waco here (indicating)—it looks purple to me—would be contracted, would it not?

A. Yes, that's correct.

Q. Yes.

Trial Examiner Norwood: Well, if another base 35485. reduces its price, it would expand that—

The Witness: Assuming no change.

Trial Examiner Norwood: —purple area?

The Witness: It would expand it.

Trial Examiner Norwood: Yes.

Go ahead.

By Mr. Paulson:

Q. What was the exact date that you prepared this; do you recall? I don't know whether the record has it identified.

A. Well, I could get you the exact date.

Q. As nearly as possible.

Mr. Hershberger: I think the record shows. Mr. Boice did not prepare the map.

Mr. Paulson: Well, can counsel give us merely the dates so that if at any time it becomes important—I don't know why it should, but it might.

Mr. Hershberger: I think that—

Mr. Paulson: It does not appear on the map, and—

(Mr. Paulson consults with Mr. MacIntyre.)

Mr. Paulson: Maybe the record shows.

Trial Examiner Norwood: Yes.

Mr. Hershberger: I think the record shows about the date.

Trial Examiner Norwood: Yes.

Mr. Hershberger: My recollection is I first became
35486 interested in this subject in June, 1939, and that the maps were prepared either the latter part of June or some time early in July, and that the figures which were produced followed somewhat later, and I think that you will find that Respondents' Exhibit 2533 indicates that the figures which Mr. Boice identified this morning were prepared on July 29, 1939.

Trial Examiner Norwood: Well, now, this map is based on those figures; is it not?

Mr. Hershberger: No, but both maps were about the same time.

Trial Examiner Norwood: Yes.

Mr. Hershberger: One followed the other within a period of possibly a week.

Trial Examiner Norwood: I see.

The Witness: Do you want this map back?

Mr. Hershberger: Yes.

(The witness hands map to Mr. Hershberger.)

(Counsel for the Commission confer.)

By Mr. Paulson:

Q. Referring again to Respondents' Exhibit 2469, which is the neutral freight zone map, Mr. Boice (indicating), was that built up on a minimum car rate for cement, or did you take into account in that map the excess—the extra freight charge—that is made when a car is above minimum?

35487 Mr. Hershberger: Well, now, Your Honor, I think the record shows that the map was prepared by someone else.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

The Witness: Now, will you read the question again, please?

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

A. I did not prepare the map.

By Mr. Paulson:

Q. Did you prepare Respondents' Exhibit 2534-A, B, and C (indicating)?

A. (Witness examines map.)

Q. Did you prepare that?

A. I did.

Q. Did you have occasion to deal with freight rates in

the preparation of this (indicating Respondents' Exhibit 2534-A, B, and C)?

A. I did not.

Q. Did you prepare Respondents' Exhibit 2533, this one (indicating)?

A. Yes.

Q. Did you have occasion to use freight rates in preparing this document?

35488 A. No, we followed the lines on the maps, and the list of neutral points that had been furnished us by our traffic department, which showed the rates.

Q. Well, you did not know, then, whether or not the map was made up from freight rate information taken from the freight rate Institute book?

A. I couldn't know that; I did not prepare the map.

Mr. Paulson: And you do not know whether or not in the preparation of any of these documents account was taken of the fact that a minimum car gets one rate for cement, and if it is sufficiently above minimum it takes another rate?

The Witness: No, I did not prepare the map; I don't think I can answer that.

By Mr. Paulson:

Q. Do you know it to be a fact that a carload of cement of minimum weight takes a certain rate between two points, and that a car for heavier load takes a different rate?

A. I am under the impression in the State of Texas we have one rate, in cents per hundred pounds, applying on any sized carload above a minimum carload of 50,000 pounds, or 132 barrels.

Q. In other words, you have one rate for a minimum car, and one for another car of 50,000 pounds or over; is that what your impression is?

35489 A. May I explain it this way: That if we are shipping a minimum carload of cement, which is 132 barrels, and the rate is 16 cents per hundred pounds, then we ship a 300-barrel car to that same point the rate is again 16 cents per hundred pounds, just the same.

Q. Do you think that that is true between all points in the State of Texas?

A. There are certain points, such as switch rates from certain mills into nearby cities, where it moves on a switch rate. Of course that would not be true.

Q. I noticed in the last freight rate book that you issued, or that was issued for the State of Texas, the exhibit number I believe is—I don't have it offhand—but it

was a Respondents' Exhibit—shows the rate by minimum car and by car of 60,000 pounds and over.

Are you familiar with that fact?

A. I do not know of any rates in Texas that are that way, except the ones I just mentioned where you have a switch rate moving from the mill into the nearby city.

Q. In other words, they charge you more for switching a heavier car than a light car; is that it?

A. No, the switch rate is the same amount, so much a car.

Q. That is per barrel, that way?

A. And obviously if you ship a large car on a flat switch rate your per-barrel cost would be less; but when you get in the country on the line rates, it is my
35490 understanding that they are all based on so many cents per hundred pounds regardless of the weight of the car, provided you ship a minimum carload.

Q. Is your information on that well founded? That is, have you had experience in it?

A. Well, of course—

Q. Are you sure of your position there, or not?

A. I did not catch that last.

Q. Are you sure of your belief there?

A. I am quite certain; yes, sir.

Q. Well, from your Waco mill do you ship into any of the other colored zones on Respondents' exhibit—

Mr. Paulson: The price map,—what is that?

Mr. Hershberger: Respondents' Exhibit 2471.

A. Well, I can't tell you about that. We didn't complete it.

By Mr. Paulson:

Q. That is what I want to know.

(Mr. Hershberger hands map marked Respondents' Exhibit 2471 to Mr. Paulson.)

Did you ship cement from your Waco mill beyond the confines of the purple zone shown on the map (showing to witness Respondents' Exhibit 2471)?

A. I will say, offhand, that we have shipped cement in every year of those years from our Waco plant
35491 into each one of these various zones, to either a greater or lesser degree, except the Gas Belt.

Q. Does the Exhibit No. 2471 apply now in connection with this?

Trial Examiner Norwood: Yes.

By Mr. Paulson:

Q. You said with the exception of what one, was it?

A. The Gas Belt.

Q. What percentage of your sales were confined—I should say, what percentage of the shipments from the Waco mill terminated within the zone shown in purple around Waco on that map (showing to witness Respondents' Exhibit 2471)?

A. Within each one of the zones on this map, 2471.

Mr. Paulson: Will you read the question?

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

By Mr. Paulson:

Q. In any given year.

A. I can't answer that with respect to this map, because I did not complete the figures. I don't know. I could find out. Of course our records will show:

Q. Yes.

A. Now, I can tell you with respect to this other map.

Q. Well, have you any idea what percentage of
35492 your shipments terminated within the areas shown in the purple area around Waco?

A. Well, I can only make a rough stab at that; it wouldn't be very far wrong from these figures here (indicating).

Q. On Respondents' Exhibit 2533?

A. How?

Q. From the figures on Respondents' Exhibit 2533?

A. That's right, and the reason I say that is because we have the figures there, and the area here, you will see, is only slightly enlarged (indicating on Respondents' Exhibit 2471).

Mr. Hershberger: Your Honor, may I make a suggestion that the witness when he talks about a map that he identify it by the figures appearing on there.

Trial Examiner Norwood: Yes.

Mr. Hershberger: Because as we read the record it will be unintelligible unless he does that.

Trial Examiner Norwood: Yes, he should identify it.

By Mr. Paulson:

Q. Well, Respondents' Exhibit 2469 shows as of the date of its making the areas which have prices made from star points within those zones, does it?

A. May I have the question again?

Trial Examiner Norwood: Read it.

35493 (Last question read.)

A. It has no relation to prices; freight rates only.

By Mr. Paulson:

Q. Well, freight rates are intimately related with price in the sale of cement, aren't they?

A. Is that a question?

Q. Yes.

Trial Examiner Norwood: Is that right, or not?

The Witness: How was that? State it again, will you, please?

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

A. Yes, but this map was made on the basis of using only the lowest freight rates from these various shipping points to show the dividing line.

By Mr. Paulson:

Q. Well, aren't those star points on that map basing points as of the time the map was made (referring to Respondents' Exhibit 2469)?

A. Yes.

Mr. Paulson: Will you find my question and read it back?

Trial Examiner Norwood: Read it.

(Previous question read by Reporter as follows: "Q. Well, freight rates are intimately related to price in
35494 the sale of cement, aren't they?")

Mr. Paulson: Will you repeat that question?

(Question re-read by Reporter.)

A. I still don't understand, because the map was prepared only with relation to freight rates, and no consideration given to price.

Mr. Paulson: Well, I won't press it any further. I wanted to see if the map did not also show that as well as what it is designed to show.

Trial Examiner Norwood: Well, it shows a freight rate zone around a basing point, doesn't it—each one of those colored areas show a freight rate zone around a basing point?

The Witness: It does.

Trial Examiner Norwood: Yes?

The Witness: Yes.

Trial Examiner Norwood: And the rates that are calculated are calculated from that basing point, aren't they—or shipping point?

The Witness: Yes, I would say that is correct.

Trial Examiner Norwood: In most cases the basing point is the shipping point?

The Witness: Yes.

Trial Examiner Norwood: Yes.

By Mr. Paulson:

35495 Q. Now, were the base point prices at those various star points the same on that date, and the date that the map was made, do you know?

A. No, I don't think they were, and I don't think they are now.

Q. Well, then, it would not show what I put in the form of the question two or three questions back—it would not be a graphic picture of the prices quoted?

Trial Examiner Norwood: It would not show the price controlled area; would it?

Mr. Paulson: No, it would not.

Trial Examiner Norwood: That is, assuming different basing-point prices; is that right?

The Witness: Excuse me, Judge.

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

A. Well, I would say this, that if every base in Texas was the same, then it would show the exact area into which each one of those bases would control the price.

Mr. Paulson: Nothing further.

Mr. Hershberger: Just a few questions on redirect.

Trial Examiner Norwood: Yes.

Redirect Examination by Mr. Hershberger.

35496 Q. In connection with that last answer that you gave, Mr. Boice, the other map, which is marked Respondents' Exhibit 2471 (indicating), was prepared to show the effect of the base price in effect at the time the map was made, and the freight rate?

A. That is correct.

Q. Thus making the zones somewhat different than on the map, Respondents' Exhibit 2469?

A. (Witness makes no response.)

Mr. Paulson: Then Respondents' Exhibit 2471 does show—is a graphic picture of the price?

Mr. Hershberger: That's right.

Mr. Paulson: The price situation as of the time of the making of the map?

Mr. Hershberger: That is right.
(The witness nods head affirmatively.)
Trial Examiner Norwood: Answer that.
The Witness: Yes.

By Mr. Hershberger:

Q. In other words, if all mills in Texas were forced to sell f.o.b. mill tomorrow, or today, at the same price to all customers who came, but each mill charging f.o.b. its mill, the price which is now its base price, then the zones into which each mill could sell at the lowest price are those zones shown on Respondents' Exhibit 2471 (indicating)?

A. That is correct.

35497 Trial Examiner Norwood: That is assuming that all of those base prices are the same; is it not?

Mr. Hershberger: No, that is assuming that the base prices remained the same as they are now.

Trial Examiner Norwood: Yes.

Mr. Hershberger: And that the mills when they began charging f.o.b. mill—

Trial Examiner Norwood: I see.

Mr. Hershberger: —charged as an f.o.b. mill price their present base price.

Trial Examiner Norwood: Thank you.

By Mr. Hershberger:

Q. And Respondents' Exhibit 2469 would show those zones, if all mills charged an f.o.b. mill price that was identical with each other mill?

A. Yes.

Mr. Hershberger: I think that makes it clear.

Trial Examiner Norwood: I think it does.

By Mr. Hershberger:

Q. Now, Mr. Boice, Mr. Paulson asked you a question a few moments ago about what percentage of your shipments from your Waco mill went into the zone colored purple around the Waco mill.

I will ask you to state whether Respondents' Exhibit

35498 2533 would indicate what percentage of your shipments from your Waco mill went into the Waco zone as compared with the shipments into other zones shown on the map numbered Respondents' Exhibit 2469?

A. It does indicate in actual figures, not percentage-wise.

Q. Take, for example, the period shown in the column July 1 to December 31, 1929 (indicating); does Respond-

ents' Exhibit 2533 indicate that the total shipments into the zone shown on Respondents' Exhibit 2469, as the Waco zone, for that period of time was 110,746½ barrels?

A. Well, that's correct, except I think that is a quarter barrel, Mr. Hershberger (indicating).

Q. Oh.

A. Instead of half barrel.

Q. 110,746¼?

A. I believe that is correct, yes.

Q. Does the figure in the same column at the bottom of the page opposite the word "total," 255,154¼, indicate the number of barrels that were sold in all of the zones shown on that exhibit?

A. That were shipped in all of those zones in that period, yes.

Q. So that for that particular period of time the percentage of the shipments into the Waco zone would be determined by comparing the figure 110,746¼ to the figure 255,154¼?

A. That is correct.

35499 Q. And that same process could be used to determine the proportion of shipments into each zone in each of the years shown in Respondents' Exhibit 2533?

A. Yes, for each individual year.

Q. Now, I will ask you to state how much is the capacity of your Waco mill in round figures—how much cement can you produce down there?

A. Approximately 900,000 per annum.

35501 By Mr. Hershberger:

Q. I would like to ask a question, Mr. Boice, whether you have knowledge as to the amount of cement that is consumed in the zone colored purple on the map, which is the Waco zone.

Mr. Paulson: Which map?

Mr. Hershberger: Respondents' Exhibit 2469.

By Mr. Hershberger:

Q. I will ask you the same question later with respect to the other map.

If you have an opinion as to what the consumption in that zone would be.

A. (Witness consults Respondents' Exhibit 2469.) I don't believe it would exceed 40 percent above these figures; in other words, I think that our shipments in that zone—

Q. The Waco zone, you mean?

A. In the Waco zone, one year with another, will account for about 60 percent of the total use of cement.

35502 Q. In that particular zone?

A. That's right.

Q. Now, would that be true also with respect to the Waco zone as shown on the price point map which is numbered Respondents' Exhibit 2471 (indicating)—or would there be any difference, in your opinion?

A. No, I think it would be—the percentage would be larger, because that covers a little more territory.

Mr. MacIntyre: Off the record, Your Honor?

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Hershberger:

Q. Well, with respect to the larger zone, as shown on Respondents' Exhibit 2471, wouldn't it be likely that your proportion from the Waco mill into that zone would be smaller?

A. That is what I mean, the percentage we would lose would be larger.

Q. I see.

With respect to the zone shown on the neutral price point map, then (indicating)—

A. Yes.

Q. —than the neutral freight point map (indicating).

A. Yes.

Q. Let me state that again so that there will be

35503 no question about it.

It is your opinion that the percentage of the consumption which your mill would ship would be greater into the Waco zone shown on the neutral freight point map than the percentage of your shipments would be on the Waco zone shown on the neutral price point map?

A. Yes.

Mr. Paulson: I suggest that you give him a figure. We are not getting anywhere with the percentage.

Mr. Hershberger: Of course, the thing is, he cannot tell until the figures are in as to exactly what that amount would be.

I think that is all.

Mr. Paulson: I would like to ask that one question.

Trial Examiner Norwood: Go ahead.

Recross-Examination by Mr. Paulson.

Q. About the amount of cement consumed in the Waco area, in a radius of the City of Waco of 100 miles, do you know, Mr. Boice, how much cement has been consumed?

A. I have never made any figures on that. It is not a large consuming area. Waco, Texas, is the largest town in that area and it is only a town of 60,000 or 65,000 people, and as territories go that would be a small cement-consuming area.

Q. Would 150 miles reach another city?

35504 A. Yes, 150 miles would put you into both Dallas and Fort Worth, which are much larger cities.

Q. Do you have the total consumption for the 10-year period, handled for the 10-year period, for the areas on the map, Respondents' Exhibit 2471, that Waco area in particular?

A. Well, that's the price map.

Q. Yes, that's the Exhibit 2471, that is the price map.

A. No.

Q. I want to know whether you have the figures.

A. No, we have never completed them. We started to get them up.

Q. I want to know whether you know how much cement was consumed in the area surrounding Waco, in map 2471, that is the price map.

A. I don't know.

Q. Have you any idea how much was consumed in the area shown around Waco, in Respondents' Exhibit 2469, the total amount consumed?

A. Well, I testified that I think it would be approximately 60 percent more than what we shipped.

Q. Well, what was it that you shipped there?

A. (Witness referring to Respondents' Exhibit 2533) Well, in 1930 we shipped in the Waco zone 113,440¼ barrels.

Q. In a quarter?

A. One-quarter barrel; 113,400 barrels and one-quarter.

35505 Q. So, somewheres around 175,000 to 200,000 barrels, in that area?

A. Well, whatever 40 percent on 60, would be.

Q. How many miles is shown in that area, can you tell how many mile radius? Can you tell by the map?

A. (Witness studies Respondents' Exhibit 2469) Well, of course, it is odd-shaped, but—

Q. Yes, but approximately. You are looking at map, Respondents' Exhibit 2469, aren't you?

A. 2469, yes.

Can I put it this way: It runs north from Waco approximately 40 miles.

Q. And now—

A. And it runs east of Waco an average of about 70 miles, and it runs south from Waco approximately a hundred miles, west of Waco probably 125 miles.

Q. Fort Worth and Dallas are north of Waco, aren't they?

A. Yes, sir.

Q. You are within trucking distance of Fort Worth and Dallas, aren't you?

A. Well, it is about a hundred miles.

Q. Well, that is trucking distance down in your country, is it not?

A. I wouldn't think so.

Mr. Paulson: Well, that is all.

35506 Trial Examiner Norwood: Call your next witness.

Mr. Hershberger: That is all, Mr. Boice.

D. R. SUTHERLAND was thereupon recalled as a witness for the Respondents, and, having been previously sworn, testified further as follows:

Direct Examination by Mr. Hershberger.

Q. You are the same Mr. Sutherland who testified before on behalf of the Universal-Atlas Cement Company?

A. I am.

Q. (Indicating) I show you Federal Trade Commission's Exhibit 366-B, which is an abstract of bids for an opening of May 22, 1937, on an invitation of the quartermaster at Fort Riley, Kansas, and I will ask you to state whether your company prepared and submitted a bid in connection with that invitation?

A. We did.

35507 Mr. Hershberger: Will you mark these for identification.

The Reporter: Your Honor, these are marked for identification "Respondents' Exhibit 2535-A and B."

(The documents were marked for identification "Respondents' Exhibit 2535-A and 2535-B.")

By Mr. Hershberger:

Q. Handing you Respondents' Exhibit, for identification, 2535-A and B, will you state what those are?

A. Respondents' Exhibit 2535-A is the invitation for the bids to which you referred earlier, and which is referred to in Commission's Exhibit 366-B; Respondents' Exhibit 2535-B is a copy of a letter I wrote on May 21, 1937, to the contracting officer, Office of the Quartermaster, Fort Riley, Kansas, to which I attached a bid for the previously mentioned proposal.

Q. Do those papers indicate what price you bid in connection with that contract?

A. They do.

Q. Or that invitation?

A. They do.

Q. Will you state how you made up your price and how you bid?

A. Yes. As I remember the proposal,—and I haven't it here in front of me,—the invitation requested bids 35508 both f.o.b. cars destination, and f.o.b. point of origin.

Our bid included a price of $2.34 per barrel in paper bags f.o.b. cars Fort Riley, and we likewise named a destination cost to the United States Government of $2.15 per barrel in paper bags for Fort Riley, Kansas. The former, or the commercial price, was figured on the price base of $1.70 Bonner Springs; 49 cents commercial freight rate per barrel; 15 cents package for the paper sacks. The destination cost of $2.15 per barrel paper—

Q. How did you get that?

A. Let me think a minute—was based on $1.70 price base of $1.70 at Iola; 30 plus cents land-grant freight, and 15 cents for paper package.

Q. Now, does Respondents' Exhibit, for identification, 2535-B indicate the make-up of that destination cost bid which you have just stated?

A. It does not.

Q. Do you know how you got the make-up that you have just stated orally?

A. Well, of course, on a particular bid that far ago I cannot be positive, Mr. Hershberger.

Q. Well, all right.

Maybe we can get by without marking these—I will hand

you a file of papers, none of which are marked for identification at the present time, and ask you to state whether those refer to a previous bid and show the make-up
35509 of a destination cost at Fort Riley (handing documents to witness)?

A. Yes, sir; they do.

Q. Which you used in the bid you have been testifying about?

A. Yes, sir; they do.

Q. Just give us briefly the time of the bid and the details of the previous one.

A. (Witness consults papers) The invitation is from the same source, dated March 25, 1937, and requests bids until April 12, 1937, for 2,000 barrels of Portland cement on which we likewise submitted a proposal.

Q. And in connection with that previous bid, did you make up in your handwriting any figures to show the destination price and the alternate destination cost bids?

A. Yes, sir; I did.

Q. Are those figures shown on this group of papers I have handed to you?

A. Yes, sir; they are.

Q. In your handwriting?

A. Yes, sir.

Q. Were the figures with respect to the price bases and the freight rates the same at the time you made the bid referred to in Respondent's Exhibit 2535-A and B, as they were at the time you made the previous bid of April 12, 1937?

A. Yes, sir; they were.

Q. And you merely used the same base prices and
35510 rates, then, in making the bid which we are identifying?

A. That is correct.

Mr. Hershberger: I will hand these documents to Counsel for the Commission. I do not care for them unless you want them. They only encumber the record. If you want them, why, we can put them in (handing documents just referred to by the witness to Counsel for the Commission). It merely shows that he used this information in a later bid.

(Counsel for the Commission examine papers.)

Mr. MacIntyre: Off the record.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Hershberger:

Q. Now, Mr. Sutherland, what did you mean by your destination cost bid? State as briefly as you can what that meant in connection with that particular bid?

Mr. MacIntyre: I object; it calls for cumulation unnecessarily. The witness has told us how he arrived at it, and we should have objected then, because as the line preceded it developed that it shows nothing than what has been shown through dozens and dozens of other defense witnesses in this case, that is a method of using a basing-point price plus the applicable land-grant or com-
35511 mercial rates, as the case may be, in determining so-called commercial prices, and so-called Government destination costs.

We object to further pursuit of the line, therefore.

Trial Examiner Norwood: I think he has covered the destination cost, and told us how he arrived at it.

Do you want to bring out any further question?

Mr. Hershberger: Yes, Your Honor, and I might say, in response to Mr. MacIntyre, that I do not propose, of course, to attempt to show all of our bids.

Trial Examiner Norwood: No.

Mr. Hershberger: But I would like the opportunity on behalf of the Universal-Atlas Cement Company to show a few so that in our case in this record—we are sued as a defendant here—

Trial Examiner Norwood: Yes.

Mr. Hershberger: —that we can establish the method which we used; if that happens to turn out the same as some others have used, I cannot help that, but I do not think we should be stopped from producing enough to show what our purpose was. I do not want to go into all of the bids, but I would like to take a few, a representative group, and I think in addition I will develop some material in connection with it that has not been brought out yet in this record.

35512 Trial Examiner Norwood: Go ahead.

I will ask Counsel to make this material as brief as he can, and I feel sure he will do that.

Mr. Hershberger: I will do that.

Trial Examiner Norwood: The objection is overruled.

By Mr. Hershberger:

Q. I would like to have you state, Mr. Sutherland, what you mean by your destination cost bid.

A. I mean by the term "destination cost," that I offered to the Government to make this sale f.o.b. cars at mill.

Q. How do you determine the price f.o.b. mill that you would charge the Government?

A. The Government determines that under the terms of the so-called control clause attached to the bid in connection with the destination cost named, by subtracting from such destination cost the applicable rate from Independence to Fort Riley, whether it be land-grant, special, or commercial, the lowest rate, I should have said—in order to arrive at its contract price f.o.b. cars our mill Independence, Kansas.

Q. Are you familiar with the fact that there have been witnesses produced by the Commission in this case, Mr. Sutherland, who have contended that a destination cost bid, such as you have described, does not enable the Government to buy at a price f.o.b. mill?

A. Yes, sir; I have so read in the record of this case.

35513 Q. Will you state whether you have actually made a bid to the Quartermaster's Corps for delivery to Fort Riley on a destination cost basis on which an award has been given to your company, and as the result of which a firm contract has then been entered into naming specifically f.o.b. mill the price derived from the destination cost bid?

A. Yes, sir.

Q. Have you done so?

A. Yes; sir; I have.

Mr. Hershberger: Will you mark this for identification, please.

Trial Examiner Norwood: It may be marked.

(The document was marked for identification "Respondents' Exhibit 2536-A and 2536-B.")

By Mr. Hershberger:

Q. I show you Respondents' Exhibit 2536-A and B (indicating), and ask you to state what that is?

A. That is a purchase order from the office of the Quartermaster at Fort Riley, Kansas, dated June 30, 1937.

Q. In what way was the sale made, f.o.b. what point?

A. The sale was made f.o.b. cars, Independence, Kansas.

Q. What is Independence, Kansas?

A. The location of one of our mills.

Q. And I will ask you to state what kind of a bid was made by your company which later resulted in that purchase contract?

35514 A. We made a bid quoting the Quartermaster f.o.b. cars Fort Riley, Kansas, and we likewise named destination cost to the United States Government.

35515 Q. Now, did you, in your destination cost bid, which resulted in the purchase contract, shown as Respondents' Exhibit 2536-A, use the same type of destination cost bid as you used in the bid which you submitted to the Quartermaster at Fort Riley, referred to in Federal Trade Commission's Exhibit 366-B?

A. Yes, sir; I did.

Mr. Hershberger: Will you mark these for identification?

(Documents were marked for identification "Respondents' Exhibits 2537-A to 2537-Z-12.")

By Mr. Hershberger:

35516 Q. Handing you Respondents' Exhibit, for identification, No. 2537-A to 2537-Z-12, I ask you to state whether that is the bid which your company made which resulted in the f.o.b. mill contract shown on Respondents' Exhibit 2536-A and B?

A. Yes, sir; it is.

Mr. Hershberger: I would now like to offer in evidence Respondents' Exhibits, for identification, 2535-A and 2535-B, relating to the invitation for opening May 22, 1937; and I would also like to offer in evidence Respondents' Exhibits, for identification, 2536-A and B, and 2537-A to 2537-Z-12, relating to the bid for opening June 17, 1937 (handing the proffered documents to Commission's Counsel).

Mr. MacIntyre: Before stating objections to these, may we see the papers that the witness used to refresh his memory and recollection this morning—

Mr. Hershberger: Yes.

Mr. MacIntyre: —in connection with the identification of some of these?

(Mr. Hershberger hands papers to Mr. MacIntyre.)

Mr. MacIntyre: Off the record.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Hershberger: Your Honor, I handed to the
35517 witness this morning a file of papers which referred to an earlier bid than the bid which the Government had put in the record. I did that because the computations showing how he arrived at the price were in the file relating to the earlier bid, and the witness said that he merely used that earlier bid file in order to arrive at prices, and therefore there were no papers in that bid that the Government had put in evidence, and which we were answering, except we were referring to an earlier file, and with respect to that file I stated that I did not care whether they were put in evidence or not. But it is perfectly all right. I have no objection.

Trial Examiner Norwood: Those have been marked for identification?

Mr. Hershberger: They have not yet been marked. They were given to the witness to refresh his recollection and then handed to the Counsel for the Commission. They have examined them, and, as I understand it, they want them marked for identification.

Trial Examiner Norwood: All right, mark them.

Mr. MacIntyre: He refreshed his memory and recollection with respect to the testimony he gave concerning the pending offer.

Mr. Hershberger: That is correct.

Trial Examiner Norwood: All right.

35518 (The documents were marked for identification "Respondents' Exhibit 2538-A to 2538-T.")

Mr. MacIntyre: Off the record.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Mr. MacIntyre: To go back on the record, I would like to ask the witness a question about the manner in which he arrived at these bids which were referred to in Respondents' Exhibit 2535-A and B.

Examination on Voir Dire by Mr. MacIntyre.

Q. I believe you testified this morning, Mr. Sutherland, that the memoranda, pencil memoranda, appearing on Respondents' Exhibits, for identification, 2538-R, S, and T, shows the manner in which you arrived at the prices which you bid in this instance.

A. T has nothing to do with it. R and S, yes. T is a listing of a telephone conversation I had with our salesman reporting on the bid submitted at the letting.

Q. And did you, in figuring bids to be submitted by the Universal-Atlas Company, do anything different in this instance from what you do in all other instances?

A. Well, Mr. MacIntyre, that is a pretty broad statement when you say "all other instances."

Q. Well, I say generally, then.

35519 A. Generally, I would say it is the same, yes.

Q. And all you did here, as I understood your testimony this morning, was to take the basing-point price of $1.70 Bonner Springs and take the basing-point price of $1.70 at Iola and calculate from those points in arriving at the price or the figure that you finally used at your mill and adding land-grant rates to it in determining your Government destination cost at Fort Riley; is that correct?

A. Well, of course, except perhaps for a little matter of terminology, about which we will not quarrel, the price base of $1.70 Iola, as shown on there, and land-grant rate of 30 cents plus, are used in computing the destination cost of $2.15, because I found that was the competition I had to meet to be as low as the lowest.

Q. Now, you are referring there to Respondents' Exhibit, for identification, 2538-R.

A. That is correct.

Q. You took the base price at Iola, added land-grant rate to it to Fort Riley—

A. That is correct.

Q. —and arrived at the Government destination cost?

A. That is correct.

Q. Then you deducted the applicable or the estimated land-grant rate from Fort Riley to your mill?

A. No, I deducted nothing.

35520 Q. How did you arrive at a figure to your mill?

A. That is the Government's job, as specified in—

Trial Examiner Norwood: Your control clause specifies that, doesn't it?

By Mr. MacIntyre:

Q. As specified on the pending offer, Respondents' Exhibit 2537-R; isn't that correct?

Mr. Hershberger: May I interrupt?

A. Yes, except we are now talking about another bid.

By Mr. MacIntyre:

Q. But it was used in both instances, wasn't it?

A. That is correct.

Q. And it was arrived at in the same manner in both instances?

A. That is correct.

Mr. Hershberger: There was a question by Your Honor, I think.

Trial Examiner Norwood: Well, I think he has covered it.

Mr. Hershberger: All right.

By Mr. MacIntyre:

Q. Have you arrived at prices any differently from that in making quotations to the U. S. Government where land-grant rates were involved?

A. Yes, sir.

Q. Well, this is your general practice, as I under-
35521 stood you to testify.

A. It was at that time, yes, but not exclusive practice.

Mr. MacIntyre: I would like to ask one further question.

By Mr. MacIntyre:

Q. This calculation appearing on Respondents' Exhibit 2538-R, for identification, is in your handwriting, I understand.

A. The red figures are not. That is the handwriting of W. H. McDowell, our sales manager at Kansas City. The black pencil figures are mine.

Q. In the lower part of the page?

A. Correct, sir.

Mr. MacIntyre: We object to the pending offers on the ground that they are irrelevant and immaterial. They show nothing other than what has been shown heretofore through the testimony of many defense witnesses. If there is any relation between the Exhibits 2535-A and B to any of the Government evidence it most certainly cannot be said that they add anything to it.

Trial Examiner Norwood: Well, they have another feature in there.

Mr. MacIntyre: I do not see it.

Trial Examiner Norwood: That is the deduction on the land-grant rate.

Mr. MacIntyre: Every witness that was placed
35522 on the stand by the Government and by the defense up to date has testified, wherever he was permitted to so testify, over objections, that they did it exactly that way and in no other way, except in a few instances since this complaint was issued they used the so-called equalization clause in figuring the bid. But the general practice has been this: Every witness has so testified.

Trial Examiner Norwood: Well—

Mr. MacIntyre: So we just think it is going over and over again what many defense witnesses have already covered.

Trial Examiner Norwood: There is an issue there as to whether or not the Government was deprived of land-grant rates.

Mr. MacIntyre: This was not offered for the purpose of showing that the Government was deprived of land-grant rates.

Trial Examiner Norwood: Yes, they are all offered for the purpose of showing that they figured in the first place on the land-grant rate, and thereafter this clause which permitted them to subtract the land-grant rate was the correct—the fair provision.

Mr. MacIntyre: I understood Mr. Hershberger to state a few moments ago that the offer was made for the purpose of showing that they quoted an f.o.b. mill price.

35523 Mr. Hershberger: That is right.

Trial Examiner Norwood: Well, go on. State your objection.

Mr. MacIntyre: Well, I have stated all the objections that we have to make; that is, that they are immaterial and unnecessarily cumulative.

Trial Examiner Norwood: I overrule the objection. Receive the documents.

(RESP. EXS. 2535-A, 2535-B, 2536-A, 2536-B, 2537-A to 2537-Z-12 were offered and received in evidence.)

By Mr. Hershberger:

Q. Mr. Sutherland, did you have other occasions when you quoted destination cost bids to the Government and were given the award?

A. Yes, sir.

Q. And in those other cases when you received
35524 the award, after you bid destination cost, did you execute a purchase contract with the Government?

A. Sometimes we did; sometimes we did not.

Q. In what way did you handle the price when you received an award on a destination cost basis?

A. Always, in so far as our records were concerned, it was carried as an f.o.b. mill price when an award was made to us on a bid which we had named destination cost to the United States Government.

Q. You mean by that in the same manner as shown on Respondents' Exhibit 2536-A and B?

A. Yes, sir; exactly.

Q. Now, in connection with these bids that we have been talking about, Mr. Sutherland, that you said you made and figured out, did you ask any competitor of yours what bid they were going to make in respect to either one of those bids that were put in evidence?

A. No, sir; I did not.

Q. Did any competitor ask you what you were going to bid?

A. No, sir; no one did.

Q. In other words, as I understand it, you had no contact with your competitors with respect to the making of these bids?

A. That is correct.

Q. Are you familiar with the contention that has been made by witnesses for the Commission in this case,
35525 Mr. Sutherland, that if you were given an award on a destination cost bid, and that if thereafter the Government had available to it a lower land grant or special freight rate than the freight rate in effect at the time you made your bid, that the Government would be deprived of the use of that lower freight rate in making shipments upon the award? Are you familiar with that contention?

A. Yes, sir.

35526 A. Yes, sir, I have seen the testimony of Mr. Holmes to that effect in the record in this case.

By Mr. Hershberger:

Q. Now, will you describe, Mr. Sutherland, with reference to the contract which you hold in your hands, Respondents' Exhibit 2536-A and B, what the total destination cost to the United States Government would be in connection with that bid that was actually submitted by you; and, in order to refresh your recollection, I hand you the bid which you made, being Respondents' Exhibit 2537-A to Z-10.

A. On the assumption that the Government, through the Quartermaster at Fort Riley, furnished us the land-grant rate which he actually paid to the Government—I mean to the railroad, the Government's cost was $2.15 per barrel in paper bags.

Q. That is the figure which you bid, is it?

A. That is correct, sir.

35527 Mr. MacIntyre: I move to strike the question and the answer, which shows on its face that it is a conclusion as to what the Government finally paid the railroad company.

Trial Examiner Norwood: Well, I consider this a matter that can be determined by the Trial Examiner and the Commission and the courts by looking at that paper and seeing the terms here of this bid.

Mr. Hershberger: It could be, Your Honor, but just a few questions will illustrate it; and there are so many papers it is going to be hard to tie up. I think you will find it helpful to give consideration to them.

Mr. MacIntyre: We had better have the Commission and the courts appraise the papers than to have witnesses on the stand appraise them.

Mr. Hershberger: He is telling us what the facts are. He is merely stating what the facts are:

Trial Examiner Norwood: In other words, you contend that this bid as put in which is based on one kind of freight would have been reduced if the Government were able to secure a lower special rate after the contract was let?

Mr. Hershberger: Precisely. In other words, if the Government's freight rate went down from 40 cents to 30 cents, the Government will be paying f.o.b. mill price plus 30 cents instead of plus 40 cents.

35528 Trial Examiner Norwood: I think that is a matter that would show from the exhibit, itself.

Mr. MacIntyre: The exhibit shows that it shows that, and he can't change it.

Mr. Hershberger: Well, I submit that what the exhibit shows would be susceptible to such computations, but the exhibit is quite numerous in its pages, and I thought it might help Your Honor.

Trial Examiner Norwood: I think the point stands out sufficiently. It certainly would not be overlooked in any case.

Objection sustained.

By Mr. Hershberger:

Q. Now, Mr. Sutherland, explain to us, if you will, please, where you got the land-grant rates in your office from which you were operating at the time in question? What was your method of getting those land-grant rates that you used?

A. Well, we had in Kansas City at that time a representative of our traffic department. He, by the way, had the desk just back of me. It was his practice to telephone, and on some occasions personally go see railroad offices in Kansas City and secure from them land-grant information. On occasion I have had occasion to do that myself. Likewise, of course, on transcript of Government bids freight rates, land-grant freight rates, are often shown, and
35529 that is another source of land-grant information.

Q. You mean by that information given by the Government in its inquiry?

A. In its transcript of the bids submitted.

Q. On previous bids?

A. That is correct, sir.

Q. Well, now, when you figure a destination cost, what process do you go through in so doing?

Mr. MacIntyre: I object. It has been covered by the witness on direct less than two hours and a half ago.

Trial Examiner Norwood: I think he has covered that.

Mr. Hershberger: Well, not in the same manner that I am now expecting to, Your Honor.

Trial Examiner Norwood: Go ahead. Objection overruled.

A. Well, in the first place, I take our own price base and add to that the land-grant freight rate applicable from our mill to the destination in question. I then determine whether, from my past experience, I think I can get my price. If I find that I think I cannot, in finding out what my competition is among probable bidders, I take the price basis, so-called, of all probable bidders on the inquiry, add to them the land-grant freight rate from their mills to the destination in question, and shrink my destination cost to
35530 be as low as the lowest figure the competition will force me to go.

Perhaps I can best illustrate that method that I have just described. Let us take seven mills, and let us call them A, B, C, D, E, F, G, and let us assume that the land grant freight rate from mill A is 23 cents a barrel; from mill B,

29 cents a barrel; mill C, 30 cents a barrel; from mill D, 18 cents a barrel; E, 38 cents a barrel; F, 26 cents a barrel; G, 34 cents a barrel.

Trial Examiner Norwood: Now, I think the process you have described is perfectly familiar to all of us. We have heard it fifty times, at least.

The Witness: Am I to proceed?

Mr. Hershberger: I would like to have the witness permitted to complete his answer, Your Honor. I do not think it will take very long.

Trial Examiner Norwood: You are going into too much detail.

Mr. Hershberger: But we do not like to be bound by other witnesses. I have read some of the testimony; I have not read all the evidence, and I do not want to be bound by what other witnesses said.

Trial Examiner Norwood: Go ahead.

A. (Continuing) And then let us assume that mill A has a so-called price base of $1.60; B, $1.70; C, $1.40; D, $1.50; E, $1.75; F has no price base, it being a price 35531 follower; G, $1.35.

And let us assume that mill A is our mill. I would like to quote or name a destination cost of $1.83, being the 23 cents land-grant freight rate per barrel from our mill, and our so-called price base $1.60. But mill D, with an 18-cent land-grant freight rate per barrel, and a price base of $1.50, is going to quote $1.68; and I must, therefore, shrink my price destination cost from $1.83 to $1.68, and my mill net to $1.45; and mill B must shrink his, if he expects to get any business, from $1.70 to $1.39; mill C from $1.40 to $1.38; mill E, from $1.75 to 1.30; mill F must accept a mill net so-called of $1.42, and mill G must shrink his 1 cent per barrel, to $1.34. That—

Trial Examiner Norwood: Shrink to the lowest combination of base plus freight; is that right?

The Witness: Yes, Your Honor, in that we, of course, can't sell any higher than the lowest that any competitor is willing to name.

Trial Examiner Norwood: Go ahead.

By Mr. Hershberger:

Q. Now, will you demonstrate in that event whether the Government is getting the full benefit of land-grant rate from your mill A?

Mr. MacIntyre: I object to conclusions of the witness

in an effort to argue, through a demonstration,
35532 whether the Government gets the benefit of land-grant rates. The facts of the transaction show whether or not they do.

Trial Examiner Norwood: He may state the conditions.

Mr. MacIntyre: Yes; but, if Your Honor please, the conditions he is stating now are assumed and hypothetical conditions and will not help us to determine the facts.

Trial Examiner Norwood: He can illustrate that, and we will proceed to get it from the illustration.

Objection overruled.

Mr. MacIntyre: If Your Honor please—

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Mr. MacIntyre: I would like to make a request on the record.

Trial Examiner Norwood: On the record.

Mr. MacIntyre: May we have marked for identification the paper from which the witness has been drawing his example, his hypothetical situation, about which he is testifying?

Mr. Hershberger: We have no objection at all to that, Your Honor.

Trial Examiner Norwood: Mark it.

(The paper was marked for identification "Respondents' Exhibit 2539.")

35533 Trial Examiner Norwood: Now, read the pending question.

(The last question read.)

A. Well, it seems to me self-evident that if I take my so-called price base and add the land-grant rate from my mill to the Government destination, that it is obvious that the Government is getting the full benefit of the land-grant freight rate.

In this particular case, by naming a destination cost 15 cents per barrel less than my price base, so-called, and land-grant freight rate per barrel, it seems to me that the Government, in addition to getting the full benefit of land-grant rates, has 15 cents per barrel, besides.

Trial Examiner Norwood: He would be getting just exactly the land-grant rate from the controlling base, wouldn't he?

The Witness: Well, my counsel asked me—

Trial Examiner Norwood: Answer my question—would he or would he not?

The Witness: I am sorry. I have lost the question.

Trial Examiner Norwood: Read it.

(The Trial Examiner's question was read.)

The Witness: If the Government bought from that mill; yes, sir.

Trial Examiner Norwood: If it bought from anywhere.

35534 The Witness: No, I can't agree to that.

Trial Examiner Norwood: He can get the benefit of it.

The Witness: I think he would be getting more than that.

Trial Examiner Norwood: All right.

Mr. Wooden: Your Honor, may I say a word?

Trial Examiner Norwood: Yes.

Mr. Wooden: We showed in our whole case instances, numerous instances, where the Government was not deprived of the benefit of land-grant rates, but we showed cases where they were. We did not contend that in all cases it had the single effect of depriving the Government of land-grant rates.

Trial Examiner Norwood: Go ahead.

By Mr. Hershberger:

Q. Now, in connection with the statement that Mr. Wooden just made, I would like to ask you a question, Mr. Sutherland:

In some instances where you bid a destination cost, does it appear that your mill net is less than a commercial price to the same destination would produce?

A. Yes, there are such cases.

Q. And in some instances, on the contrary, where you bid a destination cost, does it appear that your mill net is more than your mill net would be on a destination

35535 price to the same location?

A. Yes; there are likewise such cases as that.

Q. And what I mean by "mill net" in each instance is the destination cost less the land-grant rate, or the destination price less the commercial rate?

A. Yes; I so understand your question.

Q. Now, you are not confining your previous answer to my previous questions to the examples where your mill net is less on a destination cost than it would be on a commercial price, are you?

A. Not at all.

Q. In other words, as I understand, your contention is that any time you sell destination cost you necessarily sell less than your price base plus the freight from your mill?

Mr. MacIntyre: I object. The question is leading. It calls, in addition to that, for speculation and conclusions.

Trial Examiner Norwood: Well, I think the whole thing is already clear. Destination cost, as I understand it, is a price based on the land-grant rate, or low special rate; and destination price is based on commercial; is that right?

Mr. Hershberger: That is correct.

Trial Examiner Norwood: Well, I think your question is rather confusing.

35536. I sustain the objection.

Mr. Hershberger: The point I wanted to make clear was Mr. Wooden's illustration that he was not contending in all cases that the Government was deprived, was not a limitation of the answers which Mr. Sutherland had made to previous questions.

Trial Examiner Norwood: Go ahead.

Mr. Wooden: I just wanted to save the necessity of proving what he had proved ourselves.

By Mr. Hershberger:

Q. Now, Mr. Sutherland, we have dealt with two types of contentions that the Government has made about land-grant rates, two types of contentions that they advanced, urging that they do not receive the full benefit of land-grant rates, the first one being the matter of the lower rate after you had made your f.o.b. mill contract, and the second which we have just now discussed.

Now, are you familiar with the third contention that the Government has advanced?

Trial Examiner Norwood: I think you just want to ask him the facts here without acquainting him of what the contentions are.

Mr. Hershberger: I am going to ask him what it is.

By Mr. Hershberger:

35537 Q. Are you familiar with the third contention that the Government advances that it is not given the full benefit of land-grant rates?

Mr. MacIntyre: I object as irrelevant and immaterial testimony.

Trial Examiner Norwood: Objection sustained.

By Mr. Hershberger:

Q Mr. Sutherland, you stated that you derive your information as to the land-grant rates from inquiries of the railroads and other methods. Are those figures which you derive in those ways always the figures which the Government pays for land-grant shipments?

Mr. MacIntyre: I object.

Trial Examiner Norwood: Read the question.

Mr. MacIntyre: He is asking this witness to testify now what the result of the settlement between a particular railroad and the Government is. I do not see that there has been any information laid to show that this witness knows what kind of contractual relationship the Government and the railroad has in a particular contract.

Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: Objection overruled.

A. I can answer that as to orders which the Government has placed with us, in so far as the rate I secured from the railroad and the rate the Government told me was applicable from our mill to their destination, and
35538 I will say that there has been a variance, both the figure—one figure being larger than the other at times, other times it having been less.

As a matter of fact, I made a check of our shipments over a year and a half of the variances, and, as I remember, the amount of money involved, if I remember correctly, was $24. It was certainly less than $50 difference on the business involved.

By Mr. Hershberger:

Q. You mean by that that the difference between the land-grant rate which you had ascertained from some source, railroad or otherwise, in making your bid, and the actual land-grant rate paid by the Government when shipment was made, in the various shipments that you had made over a year and a half, revealed only a difference of about $24?

A. Yes. I think that is about—that is what I meant in my previous testimony.

Q. In other words, those were the variances one way which practically balanced the variances the other way?

A. That is correct.

Q. Referring again, Mr. Sutherland, to the bid which you made on Respondents' Exhibit 2535-B, and referring to Respondents' Exhibit 2538-R, for identification, which show the make-up of the prices that you bid, I believe you testified that the land-grant freight rate was 30 35539 cents plus; is that correct?

A. That is correct, sir.

Q. Now, why is it that you show 30 cents instead of carrying it out to what it actually was?

A. Back early in 1937, I think maybe in March, we found our competition—and, as I remember it, it was in Arkansas—naming destination costs to the United States Government in dollars and cents only, no fractions of cents being named, as had been our practice theretofore, and we naturally met that competition by changing our destination costs to the United States Government from a multiple fraction destination cost to one in dollars and cents only.

Q. Was it because the new practice resorted to by some competitors made a lower destination cost than the destination cost by you carried out into multiple fractions?

A. Yes, sir; by the amount of the multiple fraction beyond the second decimal point.

Mr. Hershberger: I think, Your Honor, I would like to offer 2538-R, one of the last group that was marked, since there has been so much talk about those figures.

Trial Examiner Norwood: I think it is already in evidence.

Mr. Hershberger: No. It was marked for identification, Your Honor. 2538-A to T were marked at the request of Counsel for the Commission, and I would like 35540 to offer one.

Trial Examiner Norwood: I thought you offered them in evidence.

Mr. Hershberger: No.

Trial Examiner Norwood: All right; go ahead.

Mr. MacIntyre: Our only objection that we raise to that is the objection we raised to the offer to which it related; that is, that it is irrelevant and immaterial.

Trial Examiner Norwood: Received as marked.

(RESP. EX. 2538-R, was offered and received in evidence.)

By Mr. Hershberger:

Q. I show you Commission's Exhibits 368-A to C, referring to bids to the Office of the Quartermaster, at Fort Leavenworth, Kansas, for an opening April 17, 1937, and ask you to state whether your company made a bid for that opening.

A. Yes, sir; we did.

Mr. Hershberger: Mark these, please.

(The documents were marked for identification "Respondents' Exhibit 2540-A to 2540-F.")

By Mr. Hershberger:

Q. I hand you Respondents' Exhibit, for identification, 2540-A to F, and ask you to state what those papers are.

A. That is a copy of the invitation, our bid, my
35541 letter of transmittal to the office of the Quartemaster at Fort Leavenworth, Kansas, with our proposal, for the cement in question as covered by Commission's Exhibit 368-A to C.

Q. And do your papers show how you made up your bid?

A. Yes, sir; they do.

Q. Please state how you did it.

A. We quoted a price $2.15 per barrel, paper, f.o.b. cars, at Fort Leavenworth, to meet competition of Lone Star with their so-called price base of $1.70 Bonner Springs, commercial freight rate 30 cents per barrel, package 15 cents; and likewise named a destination cost of $2.14 to meet the competition of the Monarch Company, with their price base of $1.70 at Humboldt, Kansas, land-grant rate 29 cents, package charges, 15 cents.

Q. Do you know whether you got the award on that particular bid, or not?

A. No, sir; we did not.

Mr. MacIntyre: I object to further questions on that line. We are going over just exactly what we have been going over the last two hours, a discussion as to how they arrived at the price.

Trial Examiner Norwood: He is discussing a particular price which is shown by a particular exhibit.

Mr. MacIntyre: Yes, but he is describing his method

there, and his description of that method is no dif-
35542 ferent given on other bids.

Trial Examiner Norwood: Go ahead.

Objection overruled.

Counsel's point is well taken, though, in part.

Mr. Hershberger: Of course, in that connection, Your Honor, there have been a great many bids put in by the Commission in which the Universal-Atlas was a bidder. Now, I do not presume that counsel will wish to say, "We want the Trial Examiner to admit all of our evidence on them," and then to say to Universal-Atlas, "You can't bring in your evidence." I think we have a right to take each and every bid that is in the record and show what we did, because there is certainly a charge here that we have colluded and conspired with our competitors, and the inference to be drawn from uniform prices, and the only way we can meet that inference is to prove what we did.

Trial Examiner Norwood: If the counsel does it the same way each time, I think that he could save us a great deal of time not to go into details about each and every one. You can connect them up by one question.

Mr. Hershberger: If the Counsel for the Commission will be willing to help us, I would be perfectly glad to do it. I do not want to be in the position where Counsel for the Commission will say, "You can't put in your evidence,"
and then, when we have not put in our evidence,
35543 "Well, you did not put in your evidence, and therefore we will draw the conclusion, because you have not put in evidence, that you must have colluded."

Trial Examiner Norwood: If you follow my suggestion, It can't hurt you, no matter what the Counsel for the Commission does.

Mr. Wooden: Let me say this, Your Honor, that we are perfectly willing to have anything put in the record by Respondents that will show a deviation or a departure from the system or method of figuring and quoting prices that we have proved; namely, the use of the basing-point system. But to prove over and over again the use and application of the basing-point system is nothing but going over the same ground.

Mr. Hershberger: Well, let me make a statement in connection with that. I suppose Mr. Wooden and I could

not agree on one of the issues in this case, but my position would be, and I will argue it, of course, later, undoubtedly, that the question is not Did we do the same thing that somebody else did? The question is, Did we do it by agreement or collusion with somebody else. I don't think it is illegal for two drug stores to charge 5 cents for a Coca-Cola, or two bakeries to charge 10 cents for a loaf of bread.

35544 Trial Examiner Norwood: No, but to go into detail, where they are all similar, I think we are wasting time.

Mr. Hershberger: I think we will—

Trial Examiner Norwood: Go ahead.

By Mr. Hershberger:

Q. Did you explain, Mr. Sutherland, how you made up your destination cost in that case?

A. Yes, sir.

Q. And did you explain how you got the land-grant rates?

A. I got the land-grant rates from our traffic department.

Q. Now, in that particular case you said you did not get the award.

A. That is correct.

Q. So there was no contract reduced to writing on an f.o.b. mill basis.

A. That is right.

Q. Or any other contract.

A. That is correct. So far as our company is concerned, that is all I know.

Q. Now, in connection with this particular bid, Respondents' Exhibit 2540-A to F, did you ask any of your competitors what price they were going to bid before you submitted this bid?

A. I did not.

Q. Did any of them ask you?

A. They did not.

35545 Q. Did you have any contact with them whatever about this bid?

A. None whatsoever.

Q. And would that statement, and these answers, refer to all other bids which you made while you were making bids to the Government?

A. Yes, sir; without exception.

Q. As well as to these that are in evidence?

A. That is correct, sir.

Mr. Hershberger: I will offer 2540-A to F (handing the proffered documents to Commission's Counsel).

Mr. MacIntyre: This offer is cumulative and therefore immaterial.

Trial Examiner Norwood: Does it show anything different from these others that we have received?

Mr. Hershberger: Well, it is a different case. It is one of the bids in the Government's case that the Government claims that we colluded with competitors. It seems to me we must have the right—

Trial Examiner Norwood: Does that have any information on the question of collusion? You see, this witness just told us that he had no agreement or understanding or conversation with his competitors. Now, do these papers show anything beyond that?

Mr. Hershberger: The only way I can answer that is to say that these papers show just what we did.
35546 They show just exactly what we did in arriving at the price. I do not see how we can answer except to show what we did. They say, "You colluded because you came out with the same price that someone else did."

Trial Examiner Norwood: Counsel should show me that this is offered for some relative purpose. A great many things which you did should not be shown in this case, but is there anything in there which negatives the idea of collusion? It is already stated that the price was figured and the bid made in the same manner as the others, and we have a number of documents in evidence for illustrative purposes. What is the use of putting those papers in?

Mr. Hershberger: Well, let me put this one in, anyway. I have had one in, and that will be enough to show what we are doing.

Trial Examiner Norwood: All right. I will overrule the objection and receive the papers.

(RESP. EX. 2540-A to 2540-F, was offered and received in evidence.)

The Witness: May we have a recess, Your Honor?

Trial Examiner Norwood: Yes. Five minutes' recess.

(There was a short recess taken.)

Trial Examiner Norwood: Proceed.

35547 Mr. Hershberger: Your Honor, in view of the fact that Counsel for the Commission had the exhibit, for identification, marked, or requested that it be marked 2539, which the witness used in discussing land-grant rates, I would like to offer that exhibit into the record (handing the document to Commission's Counsel).

Mr. MacIntyre: We object to the offer as we objected to the witness' testimony. He attempted to state a hypothetical case in an effort to argue that the Government was not deprived in such hypothetical case of any benefit by the application of land-grant rates.

As Mr. Wooden has observed, it is not the contention of the Commission's Counsel that the combination and conspiracy herein in all instances deprived the Government of the benefit of land-grant rates, and, of course, you could draw hypotheses where they would not be, and that was the purpose, as I understand, of the testimony that was offered, on which this Respondents' exhibit was based; therefore, neither the testimony nor the exhibit would be relevant or material.

Trial Examiner Norwood: Well, the testimony was admitted, and I think properly so, and that serves to illustrate it; and if you object to it I shall sustain the objection.

Mr. Hershberger: Well, may I speak on that first, 35548 if Your Honor please?

Trial Examiner Norwood: Yes.

Mr. Hershberger: In the first place, Mr. MacIntyre's statement is not the way I intended to intimate by my questions, and I am sure is not what the witness intended to intimate by his answers. In other words, the witness was asked, and he answered, to the effect that in any case —not only in those particular cases, but in any case the Government got the benefit of land-grant rates, and those were not picked out as examples where the Government got the benefit of land-grant rates and leaving out others where they would not. The witness' contention is that there can't be on our bidding destination cost, and when I say "our," I mean Universal-Atlas.

Trial Examiner Norwood: You mean in any case where the price was figured on land-grant rates.

Mr. Hershberger: That is correct.

Trial Examiner Norwood: And in any case there can't be any deprivation to the Government if you permit them

to deduct the land-grant rates in order to determine the f.o.b. mill price.

Mr. Hershberger: That is right.

Trial Examiner Norwood: Well, I do not think that needs to be proved in any case, but it is already in.

I shall sustain the objection and let the counsel
35549 keep the paper to cross-examine the witness, if he wants to.

Mr. Hershberger: Well, don't you think, Your Honor, that in view of the fact that the witness was permitted to testify orally, in order to understand the testimony which he was giving, that that—

Trial Examiner Norwood: I think it renders the paper unnecessary. It is not necessary to clarify a thing that was obvious.

Mr. Hershberger: Well, it may not be so obvious to other people as it is to Your Honor. And in writing briefs at some future time, I think it will assist us very greatly in interpreting the witness' oral testimony if we have the documents.

Mr. MacIntyre: Well, I agree with Mr. Hershberger that it is better than the testimony, but we will contend that neither the testimony nor the exhibit should go in.

Mr. Hershberger: The testimony is already in.

Mr. MacIntyre: But if the testimony is to stay in, I do agree with Mr. Hershberger that it serves to explain.

Trial Examiner Norwood: All right, then. Everybody is satisfied. We will receive it as marked.

(RESP. EX. 2539, was offered and received in evidence.)

35550 Trial Examiner Norwood: Proceed.

By Mr. Hershberger:

Q. I hand you Federal Trade Commission's Exhibit 369-B, referring to an opening of a bid at the Quartermaster's office at Fort Leavenworth, Kansas, June 1, 1937, and ask you to state whether your company was one of the bidders on that invitation.

A. Yes, sir; we were.

Mr. Hershberger: Mark these for identification.

(The documents were marked for identification "Respondents' Exhibits 2541-A to 2541-I.")

By Mr. Hershberger:

Q. I hand you Respondents' Exhibits, for identification,

2541-A to I, inclusive, and ask you to state what those papers are.

A. It is a copy of our proposal, a letter of transmittal, dated May 28, submitting a proposal for the 500 barrels of Portland cement referred to in Commission's Exhibit 369-B.

Q. Do those papers include a copy of your bid, or not?

A. Yes, sir; they do.

Q. What prices did you bid on that invitation?

A. The bid price was $2.14 per barrel in paper bags f.o.b. cars Fort Leavenworth, Kansas, being what I thought was as low as the lowest would be bid by any of our competition—and I would like to amend that testimony 35551 to read $2.15 per barrel paper.

Trial Examiner Norwood: Now, you reached that in the same manner that you reached the others about which you have given the details; did you?

The Witness: The last one; yes, sir.

Trial Examiner Norwood: Yes.

By Mr. Hershberger:

Q. Did you bid a destination cost?

A. Yes, sir; I did; $2.14 per barrel in paper bags.

Q. In other words, the destination price bid was $2.15; the destination cost bid was $2.14.

A. That is correct.

Q. And how did you make up those prices? Does that show?

A. Yes, sir.

Trial Examiner Norwood: You made them in the same way that you illustrated heretofore?

The Witness: The last one; yes, sir.

Trial Examiner Norwood: Counsel may make a proffer of this, as all the other documents he has, to the same effect, and have an exception on that.

Mr. Hershberger: I might say, Your Honor, that, of course, we have taken every bid that is in this record in which Universal-Atlas is a bidder, and we are prepared to go right through them and show what we did, because we did not contact competitors, and we want the oppor- 35552 tunity to prove that, and the only way I can do it is to go through them one after another.

I offer these documents at this time.

Mr. MacIntyre: Well, if Your Honor please, if Mr.

Hershberger has any information in the way of evidence that would show that any of the data included in these offers of the Commission that are now in the record are erroneous in any particular, or that his company used any different manner in arriving at the prices that appear on those offers than the manner in which this witness has said he has arrived at the prices about which he has just testified, we would have no objection to him offering it, but we do object to the offering over and over again of the same thing.

Trial Examiner Norwood: Now, Counsel has offered testimony and evidence which he considers is sufficient to fully explain the manner in which these bids were made, and he has also made the statement that they were not the result of any collusion with anyone—any competitor.

Mr. Hershberger: Yes.

35553 Trial Examiner Norwood: Now, if this other is just a repetition of that, taking them up one by one, counsel may offer them and I shall exclude them as cumulative and give him an exception, permitting him, however, to ask a question here which connects this information up with all the subsequent bids.

Mr. Hershberger: Of course, Your Honor, I cannot do that with one question.

Trial Examiner Norwood: Yes.

Mr. Hershberger; I must say, frankly, that I think that a great many of these bids were arrived at in the same way.

Trial Examiner Norwood: Yes.

Mr. Hershberger: There undoubtedly will be some that are slightly different,—each set of facts is different, of course.

Trial Examiner Norwood: Well, if any of them are different, why, I shall receive them, but if they are the same I think counsel can ask a few questions there and connect all of them up.

Mr. Hershberger: I have made an offer of those particular documents in evidence which I would like to have ruled on, Your Honor, at this time.

Trial Examiner Norwood: Yes.

Mr. Hershberger: Respondents' Exhibit 2541-A 35554 to I, I believe it is.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: We object to the offer as unduly cumulative, and therefore immaterial, and we do not see that it

attempts to show that the Government tabulation that is referred to was in error in any particular, for adds anything whatever to the testimony of this witness, or what the tabulation, itself, shows.

Trial Examiner Norwood: The objection is sustained on the grounds that it is not shown that they show any essential differences in the method.

Mr. Hershberger: Well, let me ask a question, Mr. Sutherland.

Trial Examiner Norwood: Yes.

By Mr. Hershberger:

Q. Mr. Sutherland, in connection with the bids which is shown on Respondents' Exhibit, for identification, 2541-A to I, inclusive, did you have any contact with your competitors prior to making that bid (showing document to witness)?

A. No, sir.

Q. Did any of them ask you what you were going to bid?

A. They did not.

Q. Did you tell any of them what you were going to bid?

A. I did not.

Q. Did you ask any of them what they were going to bid?

35555 A. I did not.

Q. Did any of them tell you what they were going to bid?

A. They did not.

Mr. Hershberger: Of course, we are put in a position, Your Honor, here where many bids have gone in—

Trial Examiner Norwood: Yes.

Mr. Hershberger: The Government put them in, and we feel that the only way that we can meet that evidence, if there is going to be any contention made by Mr. Wooden and the Commission that these bids show collusion,—then I think we should be permitted to take each one and develop specifically that there was no contact with competitors. I do not know how else we could meet that contention.

Trial Examiner Norwood: You can have this witness tell us that about these different bids. We have this in. They are all similar in two or three sets there; they illustrate the transactions perfectly.

Mr. Hershberger: In connection with my last question in which I have asked and received an answer from the wit-

ness about contacts with competitors, I think I would like again to submit the offer and have a ruling made thereon.

Trial Examiner Norwood: Well, I have sustained the objection.

35556 By Mr. Hershberger:

Q. Mr. Sutherland, there was testimony put in by the witness for the Commission, Mr. Fry, regarding some bids at Anadarko, Okla., for an opening of July 6, 1937.

I hand you a group of papers which I am not at this time having marked for identification, and ask you to state whether those are the papers which relate to the bid of your company on that particular invitation?

A. Yes, sir; they do.

Q. And do those papers include pencil memorandum by you showing how you arrived at your prices?

A. Yes, sir; as well as by our traffic man in Kansas City as to land-grant rates.

Q. Do they show that you bid a destination cost and a destination price?

A. Yes, sir; they do.

Mr. Hershberger: Now, Your Honor, this is the type of papers—

Trial Examiner Norwood: Yes.

Mr. Hershberger: That I would like to offer. I have not had them marked for identification. If Your Honor is going to make the ruling that papers of this kind might not be offered, I do not think there will be any purpose; otherwise, I will have them marked for identification and make the offer. We have a great many just like this, a

35557 trunkful, as a matter of fact (showing documents to the Trial Examiner).

Trial Examiner Norwood: Are there any essential differences between those and the others? That is, between the methods that they evidence?

Mr. Hershberger: I will let the witness answer that question, please.

The Witness: Except for a difference of figures.

Trial Examiner Norwood: Yes.

The Witness: And competition specifically.

Trial Examiner Norwood: Yes.

The Witness: It is the same.

Trial Examiner Norwood: Yes.

Well, counsel may include them all in one proffer, and

there is no use of marking them. I would exclude them as cumulative. I will give counsel the benefit of his exception.

By Mr. Hershberger:

Q. In this connection, Mr. Sutherland, I will also ask the question whether you had any contacts with your competitors in connection with this bid?

A. I did not.

Q. And would that statement be true with respect to all of the other bids in which you participated?

A. It would.

35558 Mr. Hershberger: Well, I understand, Your Honor, that that is all, in view of the position that is taken by Counsel for the Commission and by Your Honor.

Trial Examiner Norwood: Yes.

Mr. Hershberger: We have other bids here, but we would have a repetition of the process.

Trial Examiner Norwood: Yes.

Mr. Hershberger: That we have gone through this afternoon, and all I want to be certain of is that we will be protected if we do not go through this process of taking each one. Of course the Government did take each one as they put their case in, put each bid in, and we were a bidder in numerous ones, perhaps two or three hundred of them.

Trial Examiner Norwood: I think that Counsel is fully protected by his exception in the matter of the trunks full of similar documents.

By Mr. Hershberger:

Q. What other bids did you prepare, Mr. Sutherland, if you can recall, that have been referred to in the record of this case by evidence on the part of the Commission?

A. Oh, that is pretty hard for me to remember. However—

Q. Do you recall some of them?

A. Well, I remember that this man, same man, Frye, you spoke of a moment ago, referred to two bids at Shawnee, Okla., on which we bid, and in any event all bids

35559 in this period, and antedating it by several years that were prepared in the States of Oklahoma, Arkansas, Kansas, Missouri, and up until the late summer of 1935 in Iowa and Nebraska, were prepared either by me, personally, or under my immediate direction.

Q. Would that include bids to the State Highway departments, and other State agencies in those various States?

A. In those States to which I have named, and in the periods covered; yes, sir.

Mr. Hershberger: I think that is all we can do. We cannot go ahead with the particular bids.

Mr. MacIntyre: May I have the Respondents' Exhibit 2538-A to T, which you have?

Mr. Hershberger: Yes (handing documents to Counsel for the Commission); R has been introduced; R is out of that list.

Mr. MacIntyre: I believe you have some others.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: May we proceed, Your Honor?

Trial Examiner Norwood: Yes.

Cross-Examination by Mr. MacIntyre.

35560 Q. Mr. Sutherland, going to this last question that Mr. Hershberger asked you about your preparation of these bids through this period of 1935 on; do you remember?

A. Yes.

Q. Do you intend for it to be your testimony that with respect to all of these that you prepared that you had no contact with your competitors?

A. I do, sir.

Q. Or that your company had no contacts with its competitors?

A. In so far as those bids are concerned, I think I can answer they did not.

Q. You did use land-grant rates, and the control clause, in the preparation of many of those bids, did you not?

A. That is correct.

Q. And you did know when you gave your testimony here today that throughout that period down to 1937 that your company was exchanging, through the offices of The Cement Institute, estimated land-grant rates that your company and its competitors were using in the preparation of bids that were so submitted; did you not?

A. Yes, we submitted to, and received from, The Cement Institute some land-grant information. The dates, Mr. MacIntyre, I don't remember.

Q. Running right down until 1937?

A. Well, that, as I say, I cannot remember when it was.

35561 Q. Well, the record will show.

A. Frankly, however, I would like to state in that connection that our company has had a traffic department, of which we have been proud, and we have in many, many cases used our own land-grant information.

Q. But you are aware that it contacted its competitors in exchanging such information with them through the offices of The Cement Institute?

A. Well, I don't call that contacting my competitors, no.

Q. Well, they sent in to The Cement Institute, and you and your competitors received such information from The Cement Institute; you are aware of that?

A. That's correct, but I cannot subscribe that that is contacting my competitors.

Q. Yes. And that information included not only estimated land-grant information, but also terms and conditions that are included in the so-called control clause; isn't that correct?

A. That, I think, was filed during the N.I.R.A. Code; yes.

Q. And passed out by that office to your company and all of its competitors?

A. Which, as I understand, was obligatory under the Code.

Q. And you continued to use it right on down through 1937 in connection with these bids about which you have been testifying here today?

A. Yes, we did; yes, sir.

35562 Q. Did you, on occasion, Mr. Sutherland, in the preparation of these bids, receive from your headquarter's office in Chicago, from Mr. Rohwer, and Mr. Scovel, and Mr. Stone, or Mr. Cronkrite, or others in your organization, instructions as to how to make up these bids, and as to what figures to use?

A. Except for the Code period, and during the filings of destination prices and destination costs, I think the answer is "no," as to specific figures; of course, we receive instructions from Chicago on the method in which we operated in Kansas City.

Q. And that has been true all the while, has it not?

A. Oh, yes, that was a branch office.

Q. And you felt bound, of course, to follow those instructions?

A. Well, I think I am an obedient employee, yes.

Q. Now, calling your attention to Respondents' Exhibit 2538-R (indicating); you have figured out the application of an estimated land-grant rate that was used by you in determining the so-called Government destination cost at Fort Riley. In connection with that determination, you found that the Bonner Springs base of $1.70, plus its commercial freight rate of 49 cents, would control as to the so-called commercial price; is that so?

A. I believe it to be the lowest price that would
35563 be submitted by probable bidders at Fort Riley; yes, sir.

Q. Is it $2.34?

A. Yes, except, you did not include the 15-cents for package.

Q. Yes. From which if you deducted your freight rate from your mill at Independence of 51 cents—

A. Yes, sir; that's 25 cents for paper bags.

Q. Yes.

A. And the 10 cents cash discount.

Q. Yes. You would have received a mill net of $1.58?

A. That is correct.

Q. But instead of doing that you took the Iola base of $1.70, added to that an arbitrary or estimated land-grant rate of 30 cents per barrel, after disposition of a particular fraction; isn't that correct?

A. Well, not instead of; in addition to.

Q. Yes. Well, I say, instead of taking the Bonner Springs base, you did take the Iola base.

A. No, no, we bid both ways.

Q. Yes, I know, but you did bid this way?

A. (Witness makes no response.)

Q. But when you took the Bonner Springs base you did not add to that the land-grant rates from either that mill or your own mill; did you?

A. No, sir; because I thought to do that would
35564 make me high bidder, and I wanted to get the business.

Q. So the only way you did use your land-grant rate was to use it in an estimated manner adding it to the $1.70 Iola base, arriving at a so-called destination cost base based on Iola of $2.15; isn't that correct?

A. Well, I would like to—if the Reporter will please read Mr. MacIntyre's statement there.

Trial Examiner Norwood: Yes.

The Witness: I couldn't follow it; it was a little fast.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

A. Well, perhaps to clarify that it is true that to the so-called Iola price base of $1.70 we added 30 cents land-grant freight, that being the amount of land-grant freight estimated by the Union Pacific Railroad as being applicable from Iola to Fort Riley, the resultant combination of which I thought would be the lowest price submitted at this particular opening, and I, therefore, named a destination cost to meet that figure.

By Mr. MacIntyre:

Q. That is, of $2.15?

A. That's right.

Q. That is, you thought it would be submitted by your competitors?

35565 A. That is correct.

Q. And you proceeded, therefore, to deduct from that $2.15 a land-grant rate of .389918 as applicable from your mill at Independence to Fort Riley, giving you a mill net of $1.610082; is that correct?

A. That's correct.

You used one word in there I couldn't agree with, but I won't quibble with you on the language; yes, sir.

Q. Now, by doing that in your so-called effort to give the f.o.b. mill,—the Government a so-called f.o.b. mill price—you secured to yourself in your bid, if the Government should have elected to buy from you, by your so-called f.o.b. mill price derived from your destination cost, a mill net of $1.61 plus?

A. That's correct.

Q. Yet if you had used the same mill base in arriving at your so-called f.o.b. mill price as you had in quoting them on the basis of the use of a commercial freight rate, you would have secured to yourself more than 3 cents per barrel less as a mill net: isn't that correct?

A. That's a little hard for me to follow again. I am awfully sorry that I have to ask it to be re-read.

Trial Examiner Norwood: Isn't that one of those obvious things?

The Witness: Well, if it is—

35566 By Mr. MacIntyre:

Q. Well, I am asking you—

The Witness: And on your assumption that it is obvious, simply a mathematical calculation—

Mr. Hershberger: Wait a moment.

Trial Examiner Norwood: Wait a minute. I am not giving testimony—

Mr. Hershberger: I do not want the witness to make any assumption.

Trial Examiner Norwood: —I am only asking the question.

Mr. Hershberger: I do not want the witness to make any assumption, Your Honor, If he wants the question, I would like him to know what it is.

Trial Examiner Norwood: I understand that the question is if he had figured it on a land-grant rate and permitted the deduction of the commercial rate he would have lost the difference.

Mr. MacIntyre: There are two different bases involved here, Your Honor please.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: That I am attempting to show, since he elected to use one on a commercial, and the other on the land-grant rate, as to just what that does if the control clause is used in connection with it.

35567 Trial Examiner Norwood: Yes.

Mr. MacIntyre: With respect to the deprivation of the benefit of the land-grant rate.

Trial Examiner Norwood: Go ahead. I am sorry I interrupted you.

The Witness: Let me ask you, Mr. MacIntyre—

Trial Examiner Norwood: Go ahead. I am sorry I interrupted.

The Witness: Excuse me.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

A. No, I don't think so, in that I don't think the question is at all clear in that—as I understand the question—I can't answer that question.

By Mr. MacIntyre:

Q. Well, I will restate it, Mr. Sutherland.

If you had submitted your bid to the Government on the basis of a destination cost with the privilege of a deduction of the land-grant rate from your mill to Fort

Riley, using the base from Bonner Springs, as you had done in submitting the so-called destination price, with the commercial freight rate figured, you would have made less as a mill net?

A. I can't tell you that, because I don't know what the applicable rate from Bonner Springs is.

35568 It is true, Mr. MacIntyre, that we—if the Government had bought this cement from us on the commercial price which we named of $2.34, we would have received a mill net, so-called, of $1.58, and that if they had accepted the bid on the basis of the destination cost named, and deducted the applicable land-grant rate, as we figured it, we would have received a mill net, so-called, of $1.61, or 3 cents more than we would have had they purchased it on a commercial basis.

If that is what you are trying to ask me, that's true.

Q. Yes.

So, then, although you used, in connection with your control clause a land-grant rate, in doing so you did it in such a manner as to assure you securing a mill net of more than 3 cents above what you would have secured for it, under your calculation, with the use of the commercial freight rates; isn't that correct?

A. No, sir. I did it solely, Mr. MacIntyre, to attempt to be as low as the lowest bidder at Fort Riley, who would name a destination cost with a resulting price f.o.b. mill.

Q. Well, the result is what I have stated, is it?

A. The result is we would have received 3 cents a barrel more on the so-called destination cost than had they accepted the bid on the price f.o.b. cars destination, and shipped on the commercial bill of lading, yes.

35569 Q. So the Government would have—while not gaining one way or another—

A. The Government would have gained 19 cents per barrel by purchasing it under our destination cost named.

Q. But in doing so they would have paid you more than if you had used the commercial freight rate?

A. No, they would have paid us 19 cents less.

Q. I am talking about you would have secured more as the mill net.

A. We would have secured 3 cents more, yes; but, of course, you are talking about two different things, one on commercial bill of lading f.o.b. destination, another one on

Government bill of lading f.o.b. mill. They are as different as day and night.

Q. Yes, we understand that one carries a different rate from another, with the Government supposed to get the benefit of all the difference.

A. That is why, sir, to cut in on your question,—referring to the two,—they are entirely different.

Q. Now, referring to Respondents' Exhibit 2540-A, the same result would have obtained there if you had secured a contract with respect to your obtaining a greater mill net through the use of the land-grant rates than would have been the case through the use of the commercial freight rates; isn't that the case?

A. Yes, that is true; but, Mr. MacIntyre, as I say,
35570 as I testified, we are talking about two different things.

Q. Yes.

A. In other words, this morning I may take a dose of castor oil and tomorrow morning I may take a piece of candy—

Trial Examiner Norwood: Wait a moment.

A. (Continuing.) —but that does not indicate that I like the castor oil as well as I do the candy.

Trial Examiner Norwood: Wait a moment; wait a moment; just go right to the facts.

By Mr. MacIntyre:

Q. And the calculation you did work out—you did work out that calculation appearing in the upper righthand corner of Respondents' Exhibit 2540-A, did you not?

A. I did, sir.

Q. That shows by what amount your mill net would have been greater through the use of the land-grant rate calculation than would have been the case through the commercial?

A. It does.

Mr. Hershberger: Off the record, Your Honor?

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. MacIntyre:

Q. Of course, Mr. Sutherland, in both of these situations, that is that one shown by Respondents' Ex-
35571 hibit 2538-R and 2540-A, the control clause was used?

A. Yes, sir.

Q. That is, the control clause which you testified a few moments ago had been filed with The Cement Institute back during the Code days?

A. That's correct.

Q. Referring again, Mr. Sutherland, to Respondents' Exhibits 2538-R and 2540-A (indicating),—if the Government had been able to buy at the mill on the basis of your calculation, of the Bonner Springs base, and deducted the land-grant rate from Fort Riley to your mill, they would have gained, in the first instance—would have carried you back to your mill net of $1.58 in the first instance—that is, gaining the more than 3 cents.

A. Yes.

Q. And, in the second instance, more than 13 cents; isn't that correct?

A. No, I think not.

I would like to have the question read again, please.

Trial Examiner Norwood: Read it.

(Last question read.)

Mr. MacIntyre: Will you change the words "land grant" to "commercial."

Trial Examiner Norwood: Read the question as amended.

35572 (Question, as amended, read as follows: "Q Referring again, Mr. Sutherland, to Respondents' Exhibits 2538-R and 2540-A (indicating),—if the Government had been able to buy at the mill on the basis of your calculation, of the Bonner Springs base, and deducted the commercial rate from Fort Riley to your mill, they would have gained, in the first instance—would have carried you back to your mill net of $1.58 in the first instance—that is, gaining the more than 3 cents.")

The Witness: I don't understand the question. It is far from plain to me, sir. I am sorry.

Mr. MacIntyre: I will try to restate it.

By Mr. MacIntyre:

Q. If the Government on the basis of your bids of $1.70 at Bonner Springs, the so-called commercial price bid, of $2.34, if the Government had been permitted by you to deduct the commercial rate from Fort Riley to your mill, and then take the cement on a Government bill of lading, using its benefits under the land-grant rates, it would have

secured a lower destination cost, and would have given you a lower mill net,—isn't that correct?

A. Yes, that's true; but I would like to modify that to some extent, Mr. MacIntyre.

35573 Of course, we can give a customer a dollar a barrel arbitrarily. That is simply an arbitrary method you are asking me, but on the basis—.

Trial Examiner Norwood (Interposing): Now, wait a moment; wait a moment. He asked you about a fact.

The Witness: And I said "Yes, sir."

Trial Examiner Norwood: And you do not have to explain it.

The Witness: But I would like to modify it.

Trial Examiner Norwood: Of course, your counsel will give you a chance to explain later if he wants it to be explained; but you are not called upon to argue. You are under oath here; you must simply state the facts and reply to the questions asked.

The Witness: Yes, sir; Your Honor, and I am sorry if I am out of order.

Trial Examiner Norwood: No, you are all right; just from now on.

The Witness: But he stated a fact, and I said "Yes" but I would have liked to have amplified that answer.

By Mr. MacIntyre:

Q. Mr. Sutherland, instead of bidding to the Government in this case of Respondents' Exhibit 2540-A to F—instead of bidding a so-called destination cost to the Government from which it could derive your so-called f.o.b. mill price, why didn't you follow the invitation as is shown by Respondents' Exhibit 2540-C, under item

35574 2, there—as explained by that note (showing document to witness)?

A. Well, I think I did bid f.o.b. mill, Mr. MacIntyre.

Q. In accordance with the note that I have just called your attention to?

A. I think so, yes.

Q. Strictly f.o.b. mill without any reference to Government destination costs?

A. No, I bid destination cost with instructions as to how the f.o.b. mill price could be obtained.

Q. Through the use of the control clause?

A. Control clause, yes.

Q. On direct examination you stated that you had computed the totals of the differences by which these estimated land-grant rates, as used in your quotations, varied from the land-grant rates used by the Government in its settlement with railroads, and you stated that the total of those differences on one side came within $24 of balancing with the total of the differences on the other side. Do you recall?

A. I can't be sure as to exact dollars, but I think that figure somehow sticks in my mind. I know it was such a small figure, similar figure, yes.

Q. And on which side of the ledger was the amount of $24?

A. Well, unfortunately, I cannot tell you; it may have been either side; I don't remember that.

35575 Q. And in what number of transactions after which did you make your computation?

A. Well, I can't remember that, either, Mr. MacIntyre—well, I don't remember.

Q. Over what period of time were the transactions involved?

A. Over about a year and a half, or two years.

Q. What was the total amount involved?

A. That I can't remember.

Q. What two-year period do you have reference to?

A. Well, I think it was—maybe from the middle of 1936 to 1937—through 1937, but if I may make an explanation of why I seem hazy on my answers in connection with this subject, it was a routine matter to me, the thing came up one day, and was simply done, and I simply don't have any independent recollection of what the figures were, other than I, of course, remember doing the task to get the answer to which I have testified.

Q. What was the approximate date that you made the computation?

A. Sir?

Mr. MacIntyre: Will you read it?

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

A. Well, I would say 1938.

By Mr. MacIntyre:

35576 Q. For use in this case?

A. I think maybe that is a fair assumption.

Q. And—

A. And what data did you use as a basis for making your computation?

A. I took the railroad land-grant rates from our mill to the Government destinations in question, and the rate as given us by the contracting officer in charge of the reservations and agencies involved, who had placed orders with us under these bids, and compared the two.

Q. Where is the data now that you used in making that computation?

A. Well, I can't tell you that.

Mr. Hershberger: I might say that we might be able to locate it here in our trunk.

By Mr. MacIntyre:

Q. Did you use data that involved the application of rates from basing points—that is, mills of your competitors?—

A. I used—

Q. —or just for your own?

A. Just for our own.

Q. In other words, you just used one mill, the Independence, Kansas, mill?

A. Well, no, I took also some business that we 35577 had shipped from Leeds, Ala., only, however, our own mills, which, of course, was the only place where I had accurate information from the Government.

Q. And you have no recollection as to the total amounts involved?

A. No, sir.

Q. Or on which side of the ledger this $24 difference would go?

A. No, it may have been either way.

Q. And I believe you stated that you had no present memory or recollection as to the number of barrels involved?

A. No.

Q. Or number of transactions?

A. No, I am sorry, Mr. MacIntyre, to be so vague on it; I just don't remember.

Q. You did know for what purpose that you were working it up?

A. I was working, of course, for the purpose to see what the difference was, yes.

Q. In an effort to meet this contention that Mr. Hershberger claimed existed, that there had been deprivations?

A. Well, I don't know for what purpose Mr. Hershberger wanted it.

Mr. Hershberger: Of course Mr. Hershberger wants to deny any claim of asserting that there was any
35578 deprivation to the Government.

By Mr. MacIntyre:

Q. Well, when you complete your compilation, what became of it?

A. I think it was given to Mr. Hershberger.

Q. He never gave it back to you?

A. I don't remember.

Mr. MacIntyre: Do you have this compilation here, Mr. Hershberger?

Mr. Hershberger: No, I haven't it here. I say I may have it in Washington in my trunk. I am not certain whether I do or not. However, I will look for it, and if we can find it I will bring it in in the morning. I am inclined to think that we have it.

Mr. MacIntyre: That is, describing the transactions?

Mr. Hershberger: Yes, yes, I remember it quite distinctly.

By Mr. MacIntyre:

Q. Coming back to this first question I asked you, Mr. Sutherland, about land-grant information that your company passed to The Cement Institute, and land-grant information which it in turn received from The Cement Institute, do you recall, and can you testify now, what part, if any, of the land-grant information thus involved was used in these bids of June, 1937?

35579 A. Yes, sir.

Q. About which you testified?

A. Yes, sir; I can answer that one. We used none of it. On all bids to which I have testified there were no rates used as furnished by The Cement Institute.

Q. That is not exactly the question I asked you.

A. Oh, I am sorry, sir, then I misunderstood you.

Q. I asked you what part of them involved information that had in turn been involved in the land-grant information that your company had sent to The Cement Institute, or received from it?

A. Well—

Q. In months previous.

A. To answer the first part of your question, I can't, of course, remember what rates were sent to The Cement Institute, so I cannot answer that part. The second part, however, I can answer, in that in the compilation of destination costs named, in all the bids to which I testified today, land-grant rates as furnished to us by The Cement Institute were not used by me in computing those bids.

Q. But you do not know what part of this land-grant information was sent by your company to The Cement Institute?

A. No, Mr. MacIntyre, I would have no way of remembering that.

Trial Examiner Norwood: Well, did you know 35580 that the land-grant rates you used were different from the Institute rates in any one bid?

The Witness: None had to do. I had known of such, yes.

Trial Examiner Norwood: When they were different, did you use the ones you obtained directly from the railroad?

The Witness: Yes, sir.

By Mr. MacIntyre:

Q. Can you cite any instance now, Mr. Sutherland, where you used a rate, an estimated land-grant rate, that was different from the estimated land-grant rates that were disseminated to you and your competitors by The Cement Institute—that is, the so-called lowest estimated land-grant rate?

A. No, I can't name you a specific case; but I can testify that there were more than two or three; I would say as many as a half dozen.

Q. Out of a great many hundreds?

A. Well, let us say two hundred, only now, of course, you are talking about the period of time—what period of time? My testimony refers only to that period when The Cement Institute did furnish us any land-grant information.

Q. That is the period that my question went to.

Mr. MacIntyre: That is all.

35582 April 3, 1940,
Washington, D. C.

35583 Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on yesterday, the hearing is now reconvened in Docket 3167, in Room 532, Office of the Federal Trade Commission, Washington, D. C., at 10 o'clock a. m., on April 3, 1940.

Note the appearances, please.

Mr. D. R. Sutherland is recalled to the stand for further examination.

Mr. Hershberger: Your Honor, I do not think we have any further questions to ask Mr. Sutherland.

Trial Examiner Norwood: Yes.

Mr. Hershberger: And we are in this position that we have a great number of bids here that we could proceed with in the same manner as yesterday, but I do not think that there is any occasion now for making any further offer on them.

Trial Examiner Norwood: Yes, we could waste two or three days.

Mr. Hershberger: Well, I have got hundreds of them.

Trial Examiner Norwood: —in proffers on those, but the able counsel appreciates the fact that his exceptions are sufficient to protect him and his clients in these matters, and they may be considered disposed of.

35584 Mr. Hershberger: So far as I know at this time, we have nothing else in our Universal-Atlas Cement Company case, and I don't know that there will be anything else. I want to examine the record rather carefully, and if there should be any particular matter that seems to me of particular moment, why, then, I would like to have the opportunity to make a request at a later time to come back for any particular matter that might occur.

Mr. MacIntyre: Your Honor please, I believe the record clearly shows—if it does not I want it to show now—we have no objection to any offer of any bid of the Universal-Atlas Cement Company that would tend to show any error in any evidence that the Commission has heretofore offered; but that is not the understanding—my understanding—of the offer that was made by Mr. Hershberger yesterday.

Trial Examiner Norwood: Well, the record is very clear on what the offer was.

Mr. Hershberger: The only position I want to take in regard to that is, of course, I do not want to be put in position of having Counsel for the Commission put us out on a limb where we have to search through the record and find something different.

Trial Examiner Norwood: Yes.

Mr. Hershberger: We made an offer to produce
35585 all bids; we have been stopped, and I am willing to abide by that; but I do not want to be put in a prejudicial position by reason of it.

Trial Examiner Norwood: If at any time in this hearing it appears that some point is important and should be covered, why, of course, we will receive evidence on it.

35586 FRANK A. SWEENEY was thereupon called as a witness for the Respondents, and, having been first duly sworn, testified as follows:

35587 *Direct Examination by Mr. Werle.*

I am vice president in charge of sales of Edison Cement Corporation. I have held that position since November 1, 1938. I started in the cement business with the Atlas Portland Cement Company in September 1909. I remained with Atlas until 1916, holding the positions of office boy, clerk and sales correspondent. When I went with the Edison Portland Cement Company in 1916 I was made assistant to the vice president in charge of sales for the New York and Philadelphia districts. I held this position until December 1936 when I became sales manager in charge of the New York and Philadelphia territory. In July 1938 I was made general sales manager, taking in all the territory and on November 1, 1938, I was elected vice presi-
35588 dent in charge of sales of Edison Cement Corporation. As vice president in charge of sales I have full jurisdiction over sales, with four district sales managers who answer directly to me and with whom I work in the field, assisting them in getting business. The sales policies are decided upon by me in consultation with the vice president and the general manager. I have assisted in the formulation of sales and price policies for practically the

entire period of my employment by the Edison Portland Cement Company and the Edison Cement Corporation. For ten years prior to 1937 I was familiar with the factors which determined the sales policies of the Edison Portland Cement Company and the Edison Cement Corporation.

Q. Commission's Exhibit 3114-A to G refers to the reorganization of the Edison Portland Cement Company and the formation of the Edison Cement Corporation, Mr. Sweeney. Are you familiar with the purposes for forming the new company?

A. Yes, I am, in a general way.

Q. Can you tell us, briefly, what were the circumstances?

A. Well, the entire stock and ownership of the Edison Portland Cement Company rested with Thomas A. Edison, Inc., and the Edison family. The Edison Portland
35589 Cement Company had been losing money steadily for a number of years, and in order to start out with a clean slate it was decided by Thomas A. Edison, Inc., and the Edison family, to dissolve the old company and form the Edison Cement Corporation, which came into being, I believe, on January 1, 1931. All the debts and liabilities were wiped out by the Edison family and Thomas A. Edison, Inc.

Q. Was there a transfer of the assets of the old company?

A. The assets of the old company were transferred to the new company.

Q. Were any additional cement properties acquired at that time?

A. No, they were not.

My recollection is that the Edison Portland Cement Company was organized in the early 1900's, 1902 or 1903. The Edison Cement Corporation is a New Jersey corporation with its principal office at West Orange, New Jersey, and with branch offices in New York, Boston and
35590 Philadelphia. The Edison Cement Corporation is not affiliated in any way with any other cement manufacturing company, nor are any of the officers or directors of the Edison Cement Corporation officers or directors of any other cement manufacturing company. The principal officers of the Edison Cement Corporation in addition to myself are Charles Edison, president, on leave of absence; Sumner Williams, chairman of the board of directors; Ar-

thur Walsh, executive vice president; Howard Eckert, vice president and treasurer; William Hildebrand, vice president and general manager; Fred Erwin, secretary.

35591 Thomas A. Edison, Inc. is the parent organization of which the Edison Cement Corporation is a subsidiary. Thomas A. Edison, Inc. is made up of a number of units, including the Ediphone Division, the Edison Storage Battery Company, the Edison Primary Battery Division, the Edison Woodworking Division. E. Mark Battery Company and one or two minor industries. Thomas A. Edison, Inc. has no interest or affiliation with any other manufacturer of cement other than the Edison Cement Corporation.

Q. Did Thomas Edison, himself, participate to any extent in the operation of the cement division of the Edison industries?

A. Yes. Mr. Thomas Edison did participate in the operation of the cement business.

35592 Edison Cement Corporation still operates its mill
35593 at New Village, New Jersey and neither one of the Edison companies have ever operated any other mill. I believe the plant was put into operation in 1904 or 1905 and at the present time has an annual capacity of approximately 2,000,000 barrels. This figure is arrived at by taking "our" maximum daily production of approximately 5,500 barrels and multiplying it by 365. This does not take into account any shut-down period.

I do not believe that there has been a time during the past ten years that Edison has ever been able to op-
35594 erate without some shut-downs. It has ten kilns. There were short periods during the period of high demand in 1928 and 1929 when all ten kilns were operating at the same time. The discrepancy between my estimate of the Edison Cement Corporation's present capacity and the answer of the Edison Cement Corporation to one of the Federal Trade Commission's questionnaires, Com. Ex. 3114-A to G, in which Edison indicated that it has shipped 2,292,312 barrels of cement in 1929 is due to the fact that "our" capacity has been reduced because of many changes in cement specifications during the past ten years. Specificaitons have principally reduced capacity because of the requirement of fineness. Present day specifications call for a cement that is a whole lot finer than the cement manufac-

tured a number of years ago, and this added fineness slows up "our" production program to the extent indicated by "our" present capacity as compared with what it was ten years ago.

35597 The witness identified Resp. Ex. 2542 as a statement which was prepared under his direction taken from the records of the company showing shipments of the Edison Portland Cement Company and the Edison Cement Corporation from 1923 to 1939 inclusive. He can vouch for their accuracy.

35601 (RESP. EX. 2542 was offered and received in evidence.)

35603 By Mr. Werle:

Q. Mr. Sweeney, coming to another matter, does the Edison Cement Corporation have any auxiliary plant or silos, anything of that kind? Warehouses?

A. No, we do not.

Q. Have you ever had any?

A. Yes, for a short period back in 1931 and 1932 we, in conjunction with two other manufacturers, had silos in Washington.

Q. Do you sell cement in Washington, District of Columbia, at the present time?

A. No, we do not.

Q. How long since have you stopped shipping?

A. We have been out of the Washington market for the past seven or eight years, with the exception of an

35604 occasional spot shipment.

Q. Can you tell us briefly the circumstances under which you established this warehouse in Washington, the silo?

A. Well, for several years prior to the establishment of the silo arrangement in Washington, we had enjoyed a substantial business in the District of Columbia. The Lone Star Cement Corporation initiated the establishment of silos in Washington, and by that means were able to offer the trade a superior service which we attempted to meet by the establishment of the Washington Cement Warehouse Company, I believe it was known as.

Q. Did you tell us how long you had that in operation?

A. My recollection is that it was in operation for a period of two or three years; no longer than that.

Q. Now, will you tell us the circumstances under which you removed that warehouse silo from Washington?

A. Well, the situation in Washington changed to the

extent that we could not advantageously sell cement at prices which were being quoted by competition in that market, and therefore decided to withdraw.

Q. Can you explain that, Mr. Sweeney, how the change —what happened?

35605 A. Well, there were several changes downward by competitive manufacturers starting shortly after the establishment of the cement warehouse by Edison and two others. We stayed with the market as long as we could, and then decided we could not longer compete and meet the prices that were being quoted.

Q. Now, during your experience with the Edison Portland Cement Company, and the Edison Cement Corporation, has the sales area of those companies remained constant?

A. No, it has not.

Q. In what way has it changed?

A. Well, we have been obliged to withdraw from several territories by reason of the establishment of new plants which brought about lower prices, so low that we could not meet them and get a satisfactory return at our plant. The establishment of these new mills arose—

35606 By Mr. Werle:

Q. I believe you have said, Mr. Sweeney, that your market area has been shrinking; is that correct?

A. That is correct, yes.

Q. Over what period has this shrinkage occurred?

A. Why, this goes back to the early 1920's.

The witness identified Resp. Ex. 2543 as a map of the northeastern section of the United States prepared by him. The blue line, marked X, indicates the territory in which Edison is now actively soliciting business. The territory within the red line, marked Y, is that into which the freight rates from Edison's plant at New Village, N. J. are as low as the rates from any other cement plant in this territory. The circles on the maps with numbers in them represent the location of competitive cement plants.

35608 The legend explains what plants are represented in the numbered circles.

35622 Mr. Brick: Your Honor please, in accordance with your directions yesterday in connection with the objections which we planned to offer in connection with the exhibits offered by the Commission, bearing numbers 3235, 3236, and that particular offer, I have prepared the

remainder of our objections, and ask that they be included in the record.

Trial Examiner Norwood: Let me examine them and I will give them to the Reporter to be incorporated in the record.

(Mr. Brick hands a document to the Trial Examiner, which the Trial Examiner examines.)

35623 Trial Examiner Norwood: Counsel does raise some new and interesting points on them. They may be incorporated in the record, and are as follows:

"To continue with Respondents' objections to admission of Commission Exhibits, for identification, 3235 and 3236, none of the statements contained in the proposed exhibits develop any real inconsistency with the testimony made by any Respondent witness and are thus incompetent for the purpose for which they were offered. Furthermore, the offer on this ground is improper because Counsel for the Commission has failed to indicate on what portions of the proposed offer he relies for the purpose of impeaching that testimony. As a matter of fact only two of the witnesses who have appeared in this case are alleged to have attended any of the meetings referred to in the exhibits. An examination of the excerpts of the minutes shows that they relate primarily to the size, importance, membership, dues and personnel of the long defunct Association of American Portland Cement Manufacturers, and to financial reports of this Association, general building costs, publicity with regard to the uses of cement, action taken regarding building codes, articles and literature relating to technical subjects, comments on unidentifiable legal matters, educational courses in schools and colleges, uses of cement on farms and in road-beds, accounting matters, accident prevention and technical research. We sub-

35624 mit that none of the statements relating to these subjects is material or in any way impeaches the testimony of any Respondent witness.

"These proposed exhibits were also offered on the ground that they constitute admissions binding on Respondent companies. There is no proof that any of the statements were authorized or that any of those purporting to make statements were acting within the scope of their authority. In most cases, there is no proof of the companies on whose behalf the various authors of the

statements were acting. In nearly every case, there is no proof of agency between any of the authors and any of the Respondents. It is impossible to determine from the exhibit, or any proof, what part of the 250 pages of the excerpts can be attributed to Respondents.

"Furthermore, the offered exhibits reveal by their contents that many of the statements included therein were made by representatives of cement-producing companies, and the record shows that they do not enjoy corporate existence at this time and for many years have been defunct organizations. The proposed exhibits show that there are 81 organizations referred to therein which are not Respondents in this case. There is no proof of connection between any of these organizations and any of the Respondents.

"Since the exhibits are so remote they are inadmissible on that ground and it is apparent that the Respondents should not be burdened with the impossibility of
35625 meeting evidence of this character, particularly where the Commission is unable to prove it in the first instance. The circumstances and facts relating to the statements, all of which are alleged to have been made from 25 to 35 years ago, are not available to and not in the control of the Respondents. The declarations contained in the excerpts are hearsay and Respondents have no opportunity to cross-examine any witnesses having knowledge as to whether they are true or whether they were even made.

"Since there is no showing that any of the Respondents is responsible for the statements included in the proposed exhibits, it is submitted that they should be excluded from evidence. This is merely another instance of Counsel for the Commission attempting to build a monumental record of suspicion without legal proof or any regard to legal principles or standards. These methods, of which we have complained in the past, appear to be nothing more than devices calculated to bring about conclusions, favorable to the Commission's position in the case, which could not possibly be proved in fact or in law. As pointed out previously in connection with offers of a similar character, such methods are manifestly deceptive, misleading and prejudicial.

Non-Respondent Companies Involved in Commission's

Exhibits for Identification, 3235-A—3235-Z-114; 3236-A—3236-Z-107, are as follows:

Alabama Portland Cement Company, Ltd.
35626 Allentown Portland Cement Co.
Alma Cement Company.
Alpena Portland Cement Co.
Alsen's American Portland Cement Works.
American Cement Company of New Jersey.
Atlantic & Gulf Portland Cement Co.
Atlas Portland Cement Company.
Bath Portland Cement Company.
Bonneville Portland Cement Co.
Buckhorn Portland Cement Company.
Burt Portland Cement Co.
Canada-Cement Company, Ltd.
Cape Girardeau Portland Cement Co.
Catskill Cement Company.
Cayuga Lake Cement Company.
Central Cement Company.
Chicago Portland Cement Co.
Clinchfield Portland Cement Co.
Continental Portland Cement Company.
Coosa Portland Cement Company.
Crescent Portland Cement Co.
Dexter Portland Cement Company.
Dixie Portland Cement Company.
The Edison Portland Cement Company.
Egyptian Portland Cement Co.
35627 Elk Cement & Lime Company.
Empire Portland Cement Company.
Fredonia Portland Cement Company.
German-American Portland Cement Works.
Great Western Portland Cement Company.
W. G. Hartranft Cement Company, Inc.
The Hecla Company.
Helderberg Cement Company.
Hudson Portland Cement Company.
Illinois Steel Company (Cement Dept.)
International Portland Cement Company.
Iola Portland Cement Company.
Iowa Portland Cement Company.
Ironton Portland Cement Company.
Kansas Portland Cement Company.

Louisville Cement Company.
Martins Creek Portland Cement Company.
Maryland Portland Cement Company.
Michigan Portland Cement Company.
Thomas Millen Company.
Monarch Portland Cement Company.
New Aetna Portland Cement Company.
New Castle Portland Cement Company.
New Egyptian Portland Cement Company.
Newaygo Portland Cement Company.
35628 Norfolk Portland Cement Corporation.
Northampton Portland Cement Company.
Ogden Portland Cement Company.
Omega Portland Cement Company.
Pacific Portland Cement Company Consolidated.
Peerless Portland Cement Company.
Peninsular Portland Cement Company.
Penn-Allen Portland Cement Company.
Pennsylvania Cement Company.
Phoenix Portland Cement Company.
Portland Cement Company.
Riverside Portland Cement Company.
Sandusky Portland Cement Company.
St. Louis Portland Cement Company.
Security Cement & Lime Company.
Southwestern States Portland Cement Co.
Standard Portland Cement Corp.
Superior Portland Cement Co. (Superior, Ohio).
Superior Portland Cement Co. (Concrete, Wash.).
Texas Portland Cement Co.
Tidewater Portland Cement Company.
Union Sand & Material Company.
United Kansas Portland Cement Co.
United States Portland Cement Co.
Universal Portland Cement Co.
35629 Virginia Portland Cement Co.
Wayland Portland Cement Company.
Western Portland Cement Co.
Western States Portland Cement Company.
Whitehall Portland Cement Company.
Wyandotte Portland Cement Company.

Trial Examiner Norwood: I shall consider all those before ruling.

By Mr. Werle:

Q. Mr. Paulson asked you a question concerning points within this red line where your freight rates are lower than the freight rates of other mills, Mr. Sweeney. First, as to that, is your company located in what is commonly referred to as the Lehigh Valley area?

A. Yes, it is.

Q. And are you familiar, generally, with the freight rate structure around your mill as compared with the other mills in that area?

A. Yes. I am generally acquainted with it.

Q. And can you tell us about how many points
35630 within that area outlined in red your mill does have a freight advantage over the other Lehigh Valley mills?

A. Oh, there are probably a dozen points in that section of New Jersey, most of which are very small towns.

Q. Can you tell me whether, how the ratio of your shipments into that area outlined in red, during the year 1939, say, compares with the ratio of your shipments in that area to your shipments outside the area in prior years?

A. Why, in 1939 our shipments into that territory outlined in red were about 65 percent of our total shipments.

By Mr. Werle:

Q. And can you state whether or not that percentage
35631 is about the same or is it different or quite different from what it would have been in prior years?

A. Well, it may have fluctuated slightly. It might have been five or ten percent less in prior years.

Q. Would you say it was substantially the same?

A. Yes.

The witness identified Resp. Ex. 2544-A and B as a statement prepared at his direction showing shipments into areas by years into markets which Edison no longer serves. The figures were compiled at Edison's mill office and the statement itself was written up in the New York office. He can vouch for the accuracy of the figures. It shows a correct statement of Edison shipments to those areas in the years in question.

35632 (RESP. EX. 2544-A and 2544-B was offered and
35633 received in evidence.)

Direct Examination by Mr. Werle (Continued).

Q. Mr. Sweeney, are you familiar with the circumstances under which your company withdrew from these different markets shown on Respondents' Exhibit 2544-A and B?

A. Yes, I am.

Q. Will you tell us briefly what were the circumstances and what your reasons for withdrawing were?

A. Well, the two principal reasons were that the establishment of new plants in those areas brought about lower destination prices that we could not satisfactorily compete with, and the other reason was that the new mills being in closer proximity to the markets were able to give better service to the trade than we possibly could give.

By Mr. Werle:

Q. Now, according to this exhibit, your shipments in the State of New York west of Rochester dropped from 79,500 some odd barrels in 1927 to 4,000 some odd barrels in 1928, and then they remained about that figure, and smaller, until 1937. Can you tell us what occurred in that area which caused that drop in shipments?

A. Yes.

35634 A. Yes. That was caused by the establishment of two plants in the Buffalo area.

Q. And have you told us the reason why the establishment of those mills in that Buffalo area caused you to abandon that market gradually?

A. Yes. The principal reason was that the prices then quoted by the Buffalo mills were too low for us to satisfactorily compete against, and then again the Buffalo mills were able to make deliveries in that territory in much shorter time than we could, which is an important factor in the cement business.

Q. Now, as to the area west of Altoona, in Pennsylvania, shown on Respondents' Exhibit 2544-A, there is a large drop after 1927, and then a substantial increase for the year 1930 with a large drop after that.

Can you explain that, Mr. Sweeney?

35635 A. Why, my recollection is that the material pick-up in shipments in 1930 as compared with the two previous years are accounted for by a large road project in that area, in Pennsylvania, which was awarded

to a very good contractor friend of ours, and since we did not want to lose the valuable connection we went after the business, and got it.

By Mr. Werle:

Q. Have you told us what caused the withdrawal from that market in the two preceding years?

A. Why, the same reasons applied there as applied in the case of western New York territory, the advent of new mills, the finding of destination prices that were too low for us to meet satisfactorily, and the service feature.

Q. Well, in view of the lower prices and the service feature, how do you explain your willingness to take this business in 1930?

A. To maintain a very valuable contractor connection. It has been our experience when they get away from you it is mighty difficult to get them back, if ever.

35636 Q. Do you sometimes do that in other situations regardless of the price, regardless of the element of service?

A. Well, unless the price is too low. We would not want to exactly give our cement away, but we follow the plan generally.

Q. Now, without going into detail as to these other points, Virginia or District of Columbia, north central New York, and the Ohio-West Virginia area, were your reasons for withdrawing from those markets any different from your reasons for withdrawing from these others, or were they substantially the same?

A. Our reasons were substantially the same.

Q. I think you have already told us that you participated in the determination of your company's price policies?

A. Yes.

Q. First, can you tell us whether or not the cement sold by the Edison Portland Cement Company and the Edison Cement Corporation has always been sold at delivered prices?

A. Generally speaking, yes, all of our cement has been sold at destination prices, but there have been times when we have sold cement f.o.b. the mill.

Q. To what extent, if any, has the Edison Cement Corporation or the Edison Portland Cement Company exercised leadership in prices?

A. Well, we are essentially price followers. I
35637 do recall, however, there was one occasion in the early 1920's when we initiated a price advance, I think it was 25 cents a barrel, but since competition did not follow the advance we were forced to withdraw the prices and go back to the previous level.

The witness identified Resp. Ex. 2545 as a copy of an Edison letter, dated September 7, 1922, and signed by the then president, Mr. Stephen B. Mambert, addressed to all of the company's customers.

Q. Will you tell me whether or not that refers to this attempted increase in price made by you?

A. Yes, it does.

Q. Can you tell me whether you have ever attempted to take the leadership in quoting prices since that time?

A. No, we have not.

35638 Trial Examiner Norwood: This shows that Edison attempted to increase the prices on September 7, 1922, because of the increase in the price of coal; is that right?

Mr. Werle: Well, if that is what the letter says, I assume it is.

Trial Examiner Norwood: And that was the price to which he just testified to here?

Mr. Werle: Yes.

Trial Examiner Norwood: The price was not followed by your competitors?

35639 Trial Examiner Norwood: It might go in. It will be received as marked.

(RESP. EX. 2545 was offered and received in evidence.)

Q. Now, you mentioned that your company is essentially a price follower, Mr. Sweeney. Will you explain what you mean by that?

A. Why, we ascertain what the lowest quoted prices are in the field through our salesmen and customers, and attempt to meet those prices if we want the business.

Q. You said that most of your sales are made at destination prices. Will you explain the reason for that?

A. Well, the principal reason is that by experience we have learned that our customers want to know what the cement will cost them at destination, that is the way they want to buy their cement. The other reason is that
35640 it is only by knowing meeting destination prices that we can be competitive.

Q. When you say the buyer is interested in knowing the destination prices, do you refer to any particular class of buyers, or does that include all buyers?

A. It includes all buyers.

Q. Have you found that the Federal Government, for example, has purchased cement on any basis other than the basis of the delivered destination price?

A. They never have, in my experience.

Q. Does your company issue quotations to your customers quoting them prices?

A. Yes, we do.

Q. On what occasion do you issue such quotations?

A. Those quotations are issued immediately we find evidence of price changes by competitors either upwards or downwards.

Q. On the occasion of a price change, when you issue quotations, do you have any practice as to the date which appears on the quotation?

A. Well, our quotation form carries two dates, one the date of the issue of the quotation from our office, and the other the effective date of the quotation.

Q. Well, as to the date of the issue, do you mean the day that it is sent from your office, is that it?

A. The day it is made up in our office. Some of them,
we may attempt to get them all out on a certain day,
35641 but sometimes it happens because of the number,
the vast number of quotations generally issued, it is necessary to hold over the mailing a few of them or some of them until the following day.

Q. Has the Edison Corporation any practice with respect to the effective dates on advances or declines in price?

A. On declines, the new price is made effective immediately. On advances, we generally follow whatever competition we find in the field.

35642 Q. Well, with respect to that, Mr. Sweeney, when you have notice, for example, of a price advance at a particular destination, will you tell us just what you do before you determine whether or not to meet that advance at that particular destination?

A. Well, we first satisfy ourselves that the advance has been definitely established by a competitor, by picking up a number of competitive quotations in the field through salesmen and dealers. After we have picked up a num-

ber of those, have satisfied ourselves through that source that there is a general advance in price, we will meet that advance.

Q. Now, with respect to a decline in prices, how long has it been the practice of the companies with which you have been associated to make declines in price effective immediately?

A. Oh, that has always been the practice as long as I have been in the business.

Q. Well, now, do you make declines in price retroactive?

A. Yes, we do. Generally for a period of five days prior to the decline.

Q. How long have you had that policy, or this policy?

A. Well, the five-day period started during the National Recovery Code days, but we had always al-
35643 lowed our customers a reasonable time on shipments that had been made immediately prior to the decline in the market and decline in our price.

Q. How do you go about determining what was a reasonable time before you had this policy, which you say came about through the Code?

A. Well, ordinarily, I would say the bulk of our shipments are about two days in transit, possibly three days in transit, and we figure that by allowing our customers five days we were being fair with them.

Q. Tell me, Mr. Sweeney, prior to the time that you adopted more or less this five-day policy, was it of any concern of your company whether or not some competitor company was allowing more than five days, or less?

A. It certainly was. If we found a competitor company allowing more than five days to one of our customers, we met the situation.

Q. To what extent, Mr. Sweeney, does your company use basing points in the determination of its delivered prices?

A. Well, I would not say that we use basing points as such. What we do is to ascertain what the lowest competitive prices are in the field, and from long experience in the business we generally figure that any change upward or downward, general changes are traceable to an arithmetical relationship to a constant mill base price at some mill. While we pick up a number of destination quotations by competitors, we do not actually check

35644 prices from every destination. After we have checked a number of them and satisfied ourselves that such a constant base price is in effect, why, we quote our price in that area accordingly, assuming that they are correct.

Q. Do all the prices quoted by your company relate back to some base figure, as you have described it?

A. No. Some areas have what we call, or what we term arbitrary prices which are not traceable to any constant mill base.

Q. Has there ever been a time during the past, well, let's say 15 years, that all of the prices quoted by your company related back to some base figure?

A. No, there has not.

Q. How long have the terms "base mill" and "base prices" been familiar terms to you, Mr. Sweeney?

A. Well, I would say they have been familiar terms to me during my entire experience in the cement industry.

Q. Will you describe for us what you mean when you use the term "base mill," for example?

35645 A. Well, I don't know as I clarified it. When I speak of a "base mill" I have reference to a mill that quotes its prices on the basis of a constant price at that mill, adding to it the freight from that mill to destination.

By Mr. Werle:

Q. And how do you discover that certain mills are or are not base mills?

35649 A. If the quotations we find in the field are traceable to arithmetical relationship to a constant mill base price, we recognize that mill as a base mill. If such destination prices are not traceable to any constant, we accept those prices as arbitrary prices.

By Mr. Werle:

Q. Now, as to this determination discovery of base mill, do you have any source or information other than
35650 what you described by which you determine whether a mill is a base mill or non-base mill?

A. No, we do not.

Q. I believe you said a moment ago, Mr. Sweeney, that when you checked back from delivered prices you sometimes assumed that the prices at a point which you have not checked will be a certain figure.

As to that, have your assumptions always been correct, Mr. Sweeney?

A. No, sir; they have not.

Q. As to your own mill at New Village, N. J., under the term "base mill," as you have described it, is your plant at New Village a base mill or not, in your own determination?

A. Well, technically, we would not consider it a base mill, but to all intents and purposes it is, since it is in what is known as the Lehigh Valley territory from which the freight rates are identical outside of a small territory surrounding individual mills.

35657 By Mr. Werle:

Q. Mr. Sweeney, what do you use in your office—what do you use the price cards for, the destination price cards, which you do keep?

A. Well, they are used generally by sales clerks in quoting dealers and others at the particular destina-
35658 tions. Those cards are indicative of the lowest destination prices we have found in the field.

35659 Q. Mr. Sweeney, I show you Commission's Exhibit 2681, one to twenty, which represents invoices of the Edison Cement Corporation, and ask you to state whether or not the price cards, Respondents' Exhibits 2546 to 2553, include the destinations shown on those invoices, and if they do not include all of them state which ones they do not?

A. Why, the price cards include the destination prices shown on some of these invoices. I find cards missing for the others.

Q. And can you state the reason why you have not produced cards for the other destinations?

A. Yes. The invoices for which we have no cards here apply to points in the New England territory. Unfortunately, our Boston office which issues the quotations did not have the cards for that period; they had destroyed them and started anew with the price change some time in July, 1938. That is why the cards are missing.

35660 Q. But did you or did you not have cards for those points in the Boston office?

A. Yes, we have cards for all points we serve.

Mr. Werle: Now, if Your Honor please, as I understand your ruling, you sustained the objection to the offer of these cards; then with respect to that I would like to renew

the offer as to one of them, particularly because I think it raises a little different question from the others; it may come in on a different ground, that one being Respondents' Exhibit 2553. These have already been identified, and I would like to ask the witness some questions about it, but I cannot unless it has been received, so I will re-offer Respondents' Exhibit 2553 (handing document to Mr. Paulson).

Mr. Paulson: We have the same objection to this single offer on exactly the same basis as the group offer, and if any one of those is received we think that the whole card file of the company should be brought in here.

Trial Examiner Norwood: Well, I see no reason at all—

Mr. Paulson: We cannot have samples like that.

Trial Examiner Norwood: —why one card should not be received there to see what these cards are like.

The objection is overruled.

That is what number now?

35661 Mr. Werle: Respondents' Exhibit 2553.

Trial Examiner Norwood: Were they given separate numbers, each card?

Mr. Werle: Yes, Your Honor.

Trial Examiner Norwood: And what do they include?

Mr. Werle: 2546 through 2553. This is the last of that group.

Trial Examiner Norwood: It is received as marked.

(RESP. EX. 2553 was offered and received in evidence.)

By Mr. Werle:

Q. Mr. Sweeney, I notice on this price card a notation of a reduction in price three days apart with the little note, "Arbitrary" in parenthesis after it.

Can you explain the nature of that change in price, what occurred there?

Mr. Paulson: Well, that is just what I thought the thing would develop into, get a card and than we would spend an hour talking about what is on the card. It is all immaterial, irrelevant, and incompetent in this case.

Trial Examiner Norwood: I do not think counsel should anticipate.

Mr. Paulson: This question certainly does not go to any issue in this case. I do not know whether it is hereti-

35662 cal to refer to the complaint or not, but it certainly could not come within anything that is stated in that complaint.

Trial Examiner Norwood: There is a change in price there which he wants to explain. It may go to the method here that is under investigation.

I shall overrule the objection.

A. The price shown on here, July 5, 1938, for Phillipsburg, N. J., was the destination, the lowest destination price which we at that time assumed had been quoted by competition. Several days later, however, we discovered that we were in error, and that the lowest quoted price for Phillipsburg, N. J., was $2.18, which we quoted on July 8th.

By Mr. Werle:

Q. When you say you assumed that in the first instance what the lowest price would be, what was the basis for that assumption, if you recall?

A. Well, we had not taken up a written quotation for this particular delivery. We had picked up several others in the general territory and assumed that a certain base price was in effect applying to the whole territory. We discovered later that our assumption was incorrect.

Q. How did you discover that?

A. Why, it was called to our attention by the dealer whose name appears on that card.

35663 Trial Examiner Norwood: How soon did you discover that?

The Witness: It was about three days later, according to that card, Your Honor.

By Mr. Werle;

Q. Do you recall any other instances of a character similar to that, Mr. Sweeney?

Mr. Paulson: We have an objection to this entire line, Your Honor please.

Trial Examiner Norwood: Yes, and Counsel has an exception.

A. Yes. There were other similar instances where our assumption was incorrect, and that our competitors had quoted lower prices than we figured were in effect in a given market.

By Mr. Werle:

Q. I believe you told us earlier this morning that you at one time were active in the field; that is, throughout your territory, as distinguished from being in the office; is that correct?

A. Yes. For many years I was in the field.

Q. Will you tell us what was the nature of your activity in your sales territory during that period?

35664 A. Why, for a number of years I was assistant to the vice-president in charge of sales. One of my duties was to spend many days a week in the field with our salesmen calling on dealers, contractors, and others, in an effort to assist the salesmen in developing business.

By Mr. Werle:

Q. And were you familiar during that period with the instructions which your salesmen had as to the activity of competitors?

35665 A. Yes, I was.

35666 Trial Examiner Norwood: Now, there is one thing certain, we are not going to spend as much time bringing out these non-essential details of fact which are not contrary to the contention of either side and which have been put in rebuttal by both sides, and I urged and pleaded with counsel associated with the firm of Donovar Leisure, Newton & Lumbard to avoid these from now on, and they continue to go over the same ground with the same detail with every one, when it is entirely unnecessary.

Mr. Werle: Well, may I make just one statement as to that, if Your Honor please?

Trial Examiner Norwood: Yes.

Mr. Werle: I have noticed that Your Honor has characterized our procedure in that way on several occasions, and I have noticed that when some other attorney comes in with a different Respondent, simply because he happens to be here asking the questions, instead of us, there is not the same characterization; and I do not think it is quite fair to so characterize our procedure, because we feel that each new company that is coming along, that we are presenting solely the defense of that individual company, and we, I do not think, should be any more bound by what some

35667 other company has proved on that point than if a new attorney came in and conducted the examination; and we are certainly, I think—I think we have made great bounds, headway in cutting out what you refer to as non-essential details. We have been able to stipulate from time to time on certain things about which we think there would be no controversy, and we have curtailed to great length examinations that we might very well make within our rights, I think, but we have tried to confine these examinations to what we think are essential facts.

Now, there may be details in some instances, I am sure, but we cannot help that.

Trial Examiner Norwood: Counsel did that for a while but they seem to be going back to the old method. I do not remember any characterization there which you objected to, simply that I said non-essential details. Is that what the counsel objected to?

Mr. Hinds: May I be heard?

Trial Examiner Norwood: Wait a minute. I asked the other counsel.

Mr. Werle: I think perhaps I can shorten this a little bit by lumping a few questions together, if that is what is desired, but I am trying to cover it in an orderly way, one question after the other.

35668 Trial Examiner Norwood: I think now, you refer to the other counsel here and my treatment of them. I have not altered my attitude to any particular method because of one counsel or because of another that has done it, but some of the counsel have come in here with the idea of getting their evidence in and get through, and have really shown us how the matter can be expedited.

For instance, this morning, entire trunks of similar documents were described for the record by Mr. Hershberger and a ruling made on them in a way as to give him his exceptions to the whole thing; and we did make speed, and I think we should keep that up at this stage of the hearing.

I have been patient with you gentlemen all along here. You cannot complain about that in any way.

Mr. Brick: Well, I do not think there has been a great deal of patience displayed, if Your Honor please, with regard to the constant interruptions by way of objections, many of which do not seem to be supported by sound grounds, and also queries put by Your Honor with regard to the purpose which we desired to make of many items of evidence.

Now, I think if we are to show any virtue by way of patience, it means that we are supposed to have a certain amount of confidence in the attorneys who are presenting their evidence. Now, we are not presenting anything

35669 here except evidence which we think is significantly material. We have followed all of your admonitions with regard to matters, even in cases where we think we are prejudiced, and I think if we could experiment to

the extent of trying to go through a day without interruptions of the kind which we have met repeatedly over several months' time, that you will find that we can make much more headway and a witness won't be in a witness chair for so long a period of time.

Trial Examiner Norwood: If what?

Mr. Brick: I do not understand the question.

Mr. Paulson: Mr. Brick just said if we did not interrupt with objections.

Trial Examiner Norwood: Yes.

Mr. Paulson: And I submit—

Mr. Brick: Needlessly.

Mr. Paulson: I submit the record does not show two pages, or a page, of discussion by Commission's Counsel this morning.

Trial Examiner Norwood: Well, the counsel has his own definition of patience, and I would not deny him that. He may apply it as he sees fit.

Proceed.

By Mr. Werle:

Q. Well, let us see if I can shorten this.

35670 Trial Examiner Norwood: Yes.

By Mr. Werle:

Q. Mr. Sweeney, do I understand that you went around with your salesmen from day to day and visited the customers and discussed matters with them as a regular course of your business?

A. Yes.

Q. Is that correct?

A. Yes, I did.

Q. Do I understand also that your salesmen did have instructions, to keep immediately abreast of all current matters occurring in the field?

A. Yes.

Q. Is that correct?

A. They did; yes, sir.

Q. And during this period did you personally discuss things and talk over matters of cement sales and policies with your customers?

A. Quite frequently, yes.

Q. And during that period did you personally have firsthand information and knowledge as to the prices, policies, and practices of your competitor companies?

A. Yes, I did.

Q. Now, will you tell me whether or not during that period you observed that the prices of all of your
35671 competitors were always the same as the prices of your company, or were they all the same, or not?

35672 A. They were not all the same as the prices of our company.

By Mr. Werle:

Q. What period of time does this cover that we are discussing, Mr. Sweeney?

A. Oh, practically my entire period of the Edison Cement—Edison Portland Cement Corporation and Edison Cement Corporation.

Q. I want to come to another subject: The question of truck delivery.

I believe the record shows that your company at one time sold cement to buyers' trucks for delivery at the mill, and that you discontinued that in the summer of
35673 1932. Is that correct?

A. That is correct; yes.

Q. Will you tell me whether during that period that you were delivering to buyers' trucks, before that, and since that, have your customers frequently demanded the right to take delivery in that fashion?

A. No, they have not frequently demanded the right to take cement in that fashion.

The witness identified Resp. Ex. 2554 as a statement prepared under his direction showing Edison's deliveries f.o.b. customers' trucks at the mill from May 1, 1929
35674 to July 31, 1932. This represents the time when Edison had the greatest truck movement from its plant. This information was taken from the daily record of shipments. The first column on Resp. Ex. 2554 represents the number of truck deliveries during the month; the second column the number of barrels.

(RESP. EX. 2554 was offered and received in evidence.)

By Mr. Werle:

Q. I believe the record also shows that your company at one time charged 15 cents extra for delivery to buyers' trucks; is that correct?

A. That is correct.

Q. Are you familiar with the circumstances
35675 which caused your company to make that charge?

A. Yes, I am.

Q. Will you tell us about that, please?

A. Well, before that charge was assessed, we had discovered that it was costing us considerably more to load trucks at the plant than it did to load freight cars, and when one of our competitors indicated that they were assessing a charge of 15 cents a barrel over and above their regular price for delivery to trucks, why, we immediately adopted the same plan.

Q. Can you tell me, Mr. Sweeney, whether or not at this period in 19—. What was this, 1930 or 1931?

A. 1929 to 1932.

Q. Can you tell me whether or not this was the first time that your company had made some extra surcharge for truck delivery?

A. No, I recall that several years prior to that time we had a charge for delivery to trucks over and above our regular price.

Q. When you put on the 15-cent charge in 1929 and 1930, whatever it was, will you tell me whether or not it applied retroactively to orders which had been received prior thereto, or how did you work that?

A. No, no, it did not apply retroactively. It was made effective from that date forward on new business. It was not assessed on any contracts we might have had on the books.

Q. Did you say it was or was not applied to contracts?

35676 A. It was not applied to contracts that we had closed.

Q. I see.

Now, at the time that your company put in this 15-cent charge for delivery to trucks, did any of your competitive companies discontinue trucking at their plants?

A. You mean immediately we put this charge in?

Q. Yes.

A. No, I don't recall that any company immediately discontinued trucking at that time.

Q. For how long a period after you began to charge 15 cents more, would you say that the first competitor of yours eliminated trucking from his plant?

A. Oh, my recollection is that it was within six months, or so, after the charge was put on.

Q. Did you participate in the discussion in your com-

pany which resulted in your adding this 15-cent charge for truck delivery?

A. Yes, I discussed it with our vice-president in
35677 charge of sales.

Q. Do you know whether or not that charge was imposed as the result of any understanding or agreement on the part of your company with any of your competitors?

A. To the best of my knowledge, it was not.

Q. Prior to the time that your company eliminated trucking in 1932, as the record shows, what means did your company resort to, if any, to prevent the use by customers of trucks that were taking delivery?

A. We used no means to prevent customers from taking cement by trucks.

Q. What, Mr. Sweeney, was the immediate circumstance which caused your company to discontinue delivery to customers' trucks in 1932?

A. Well, we found that other mills in our district had discontinued trucking from their plants, and it had been such a nuisance and headache to us that we were glad to follow the lead of the other manufacturer in that respect.

35678 The witness identified Resp. Ex. 2555-A as a letter, dated June 21, 1932, from the Building Material Dealers Association of Easton, Pennsylvania, addressed to Edison; Resp. Ex. 2555-B as a copy of a letter, dated June 10, 1932, which accompanied Resp. Ex. 2555-A; Resp. Ex. 2556 as a Lehigh letter, dated July 28, 1932, to its dealers. The information contained in these exhibits was typical of the information to which he had referred when he said that he had heard that other companies were discontinuing trucking.

35682 The Reporter: Your Honor, these are Respondents' Exhibits 2555-A and B, and 2556.

(RESP. EXS. 2555-A, 2555-B, and 2556 were of-
35683 fered and received in evidence.)

By Mr. Werle:

Q. Now, Mr. Sweeney, did you participate in the discussions in your company which brought about the discontinuance of trucking by your company?

A. Yes, I did.

Q. Can you tell us whether or not the discontinuance came about as the result of any understanding, agreement, or arrangement with any of your competitor companies?

A. It did not.

Q. Now, I think you mentioned earlier something about trucking being a nuisance, or difficulty with trucking—I have forgotten your exact language.

Will you tell us very briefly what your experience was in that respect?

A. Well, in the first place, our plant was not designed to handle trucking. It was designed exclusively for rail movement. We have had a bad physical condition there as regards trucks in and out of the mill.

In the first place, there is a very narrow road—

Trial Examiner Norwood (Interposing): Well, I do not think you need go into detail. Just sketch it for us and tell us the reasons.

The Witness: We had no facilities for moving trucks or expedited trucks, in and out, because of lack of
35684 space. We were obliged to first load cement on cars, and move them away from the packing house to a platform where they were loaded to trucks at an additional expense; because of the various tested cements we manufacture it was always difficult to promptly and properly fill orders, since these trucks came into the plants spasmodically, at very uncertain times. Our packers were paid on a piece basis, and they objected to loss of time, waiting for trucks. The whole proposition was generally unsatisfactory, at least as far as our plant was concerned.

By Mr. Werle:

Q. Mr. Sweeney, if you can see this all at one time, I show you Respondents' Exhibit 2557, for identification (indicating); I will ask you to just tell us what that is?

A. This is a blueprint of the plant and trackway out of our plant at New Village, N. J.

35686 *Examination on Voir Dire by Mr. Paulson.*

Q. Will you show me on this map, Mr. Sweeney, where the trucks drove up to your plant to haul away the 10 percent of your production in 1932?

A. In the first place, I don't think it was 10 percent of our production.

Q. That is what the exhibit shows.

A. Well—

Q. Nine—you trucked 9.70 percent in 1932?

A. That's right.

Q. Forty thousand barrels?

A. Yes.

Q. Where did the trucks drive when you go up (indicating on Respondents' Exhibit 2557)—

A. (Indicating on exhibit.) The trucks entered from the main highway down this road here under the railroad tracks.

Q. Yes.

A. And they went up this 18-foot concrete road, and on this rail—railroad track here (indicating)—we had loaded center cars with a platform between the car,
35687 alongside of the car, rather, and the trucks backed onto this platform and were loaded (indicating).

Q. Yes.

A. This is the track that was used for the cars containing cement which was later re-loaded onto trucks.

Q. Have those conditions changed since 1932?

A. No, they have not.

35688 By Mr. Werle:

35689 Q. Now, Mr. Sweeney, apart from these difficulties which you have described to us, can you state what the attitude of your customers was with respect to trucking?

A. Yes. A number of our larger customers in the New Jersey territory strenuously objected to trucking.

Q. Did any of those objections come to your attention?

A. Yes, a number of them did.

Q. And can you tell me what the nature of those complaints, or objections, was?

A. Well, the principal objection was that a considerable amount of the cement was hauled by fly-by-night-truckmen, who made sales along the line in the territories of our long-established dealers, and naturally caused those dealers considerable irritation, and bringing about a very unfriendly feeling as far as the dealers were concerned toward our company.

Q. After your company discontinued delivering to customers' trucks, did you make any effort to find out what the reaction of your customers was?

A. Yes. We did make an effort to find out what the reaction of our customers was.

Q. Will you just explain what you did in that respect?

A. Well, our salesmen were instructed to discuss the

situation with our customers to find out what their reaction was towards discontinuing trucking.

35690 Trial Examiner Norwood: Hasn't the Commission's Counsel admitted that, and also produced evidence to prove that some dealers did not desire the manufacturers to truck?

Mr. Paulson: Our position has been that some of the larger dealers and some of the dealer organizations have opposed trucking of cement, and that many dealers desired it. We do not know the exact proportion. We also say that the dealers' associations, and some of the larger dealers, have conspired with the cement manufacturers in an effort to prevent transportation of cement by truck.

Trial Examiner Norwood: Now, if those documents there are to be offered to prove that, or if those are letters from dealers stating that they did not desire trucking, will the counsel just describe them so that we can handle them all quickly?

Mr. Werle: As to Mr. Paulson's statement, I think his statement proves our right to put these in. It shows their relevancy, materially. He says they charge us with a conspiracy among our dealers to do this thing. To describe them briefly, these are letters received by the company after they announced that they would discontinue trucking from some customers and one from a salesman indicating—and I will ask the witness whether or not they indicate the typical attitude taken by most of the

35691 customers.

Trial Examiner Norwood: If they have not been marked, just describe them.

Mr. Werle: I have already described them generally.

Trial Examiner Norwood: They are refused—I shall refuse to allow them to be marked.

Mr. Werle: Your Honor please, how can we have any exception if we cannot have the documents marked? I think it will only take a fraction of a second to have them marked.

Trial Examiner Norwood: You can take your exceptions to my statement, and to my refusal to having them marked since they appear to be letters from dealers expressing their approval or disapproval of trucking.

35692 Mr. Brick: I think, Your Honor please—

Trial Examiner Norwood: Now, will Counsel not offer any of those to be marked?

Your exception on that covers everything of that nature.

Mr. Werle: Well, I am content with Your Honor's ruling that they shan't come in, but I would like—and if it is a question of saving time, to have the Reporter give these an exhibit number during the recess or at some other time, so that we can refer to them by numbers at some future time.

Trial Examiner Norwood: Will you describe a sample and let him mark that.

Mr. Werle: There are only three or four.

(The documents were marked for identification "Respondents' Exhibits 2558, 2559, 2560, and 2561.")

Mr. Werle: As I understand, these have been rejected.

Trial Examiner Norwood: Yes.

Mr. Werle: There has been no objection to their identification. I want to be sure that we are protecting ourselves.

Trial Examiner Norwood: I think so.

35693 Mr. Paulson: We do not have any objection to stating that they purport to be what they are on their face.

Mr. Werle: What I said they are.

Mr. Paulson: Yes, to what you said they are, so far as the identification is concerned.

We object to their competency. We think they are hearsay.

By Mr. Werle:

Q. Mr. Sweeney, did your company regard delivery to customers' trucks at the mill as a menace to your company's prices, or pricing?

A. No.

A. No, we did not.

35694 Q. Tell me this: During the period that your company was trucking, did trucking have the effect of reducing your mill nets or increasing them, or was there any difference?

A. Well, during the period that the 15-cent charge was on, it had the effect of increasing our mill nets.

Q. Do you recall the period of the price war in 1931?

A. Yes, I do.

Q. From your experience at that time, to what extent do you say that the price war was caused by the use of trucks or truck delivery?

A. I would not attribute that price war to any trucking situation.

Q. At the time that you discontinued trucking in 1932, did you make any provision with respect to unfilled contracts?

A. Yes. We completed all of our unfilled contracts.

Q. By that I mean as to whether the customer was permitted to come to the mill for that purpose?

A. Yes. He was. In accordance with the terms of the contract he could come to the mill and get whatever cement was needed to complete that contract.

Q. Now, in the normal course of your business, when you obtained orders for cement to be delivered by rail, when are those orders filled and sent out?

A. Well, normally, if they are not received too late in the day, and they do not require that a specially
35695 tested cement be supplied, shipment is made the same day the order is received at the plant.

Q. And in the normal course of your business, how long does it take a customer at Harrison, N. J., for example, to get cement that is delivered in the late afternoon from your mill?

A. Ordinarily, we can effect such deliveries the following day.

By Mr. Werle:

Q. Would you say that is the normal time?

A. Yes.

Q. Does the Edison Cement Corporation, at the present time, solicit business in Oswego, Wayne, Cayuga, or Jefferson Counties in New York State?

A. No, we do not.

35696 Q. Will you tell us what the reason is that you do not?

A. Well, it is another one of those situations brought about by the establishment of new conditions, by competition, which in this case was the silo arrangement by Huron Cement Company in Oswego, N. Y. The Huron Company permitting the trucking of cement from their plant in Oswego into that territory you describe, because of our location we could not possibly meet that sort of competition, and, therefore, withdrew from active solicitation in that market.

Q. Will you tell me how you found out about that condition?

A. Through our salesmen in that territory, and dealers.

The witness identified Resp. Ex. 2562 as an Edison memorandum, dated October 4, 1937, to the witness from John K. Usher, at that time one of the company's New York State salesmen; Resp. Ex. 2563 as a memorandum to him dated October 7, 1937, from Mr. H. L. Dening who at that time was one of Edison's salesmen in New
35697 York. These memoranda came to his attention in the regular course of business. They relate to the trucking situation in those four counties in New York State. The computation at the bottom of the page of Resp. Ex. 2562 as his own.

Mr. Werle: I offer those in evidence (handing documents to Mr. Paulson).

Mr. Paulson: I want Your Honor to see these. This morning this witness told us how he priced his cement, that his salesmen wrote him, told him conditions. Your Honor ruled, then, that you had enough of it, and here we are with two letters showing that the salesmen reported to this company as to the conditions in the field. It is a subject about which there is no controversy in this case.

I object to it.

Trial Examiner Norwood: The objection is sustained.

35698 By Mr. Werle:

Q. Has the Edison Cement Corporation, or the Edison Portland Cement Company, ever availed themselves of water delivery, Mr. Sweeney?

A. Well, only to the extent that we make water deliveries from New York harbor, shipping the cement to that point from our mill by rail, loading it on barges in the harbor.

Q. Have you been doing that for any particular time? How long?

Mr. Paulson: I object. I do not know anything in issue about this company's water transportation.

Mr. Werle: There is a charge in the complaint, Your Honor please, about water transportation, and I do not think it singles out any particular company. It says all of them.

Mr. Paulson: The charge in the complaint is that this industry maintains a price system to lessen competition; one of the attributes of that system is to deprive the public of the benefit of water transportation.

35699 Mr. Werle: Yes, I want to go into that, if there is any contention, as to what extent there is deprivation.

Trial Examiner Norwood: Well, is this a case of transporting the cement by water and charging rail rates?

Mr. Werle: Why, no, Your Honor. This company does not charge any rail rates at all. This company meets prices it finds at destination, and they transport in the way that they think is the best way to get it there, unless there is some special consideration.

35700 Mr. Paulson: But there is nothing in the complaint or proof that this company did any particular thing with regard to water rates, and to take up the time of the hearing with each company and show that they are not geographically situated so as to make use of water rates and transportation, and therefore have never conspired not to use water rates, is wasteful. They are eliminated when there is no evidence against them except in so far as they conspired with them in the maintenance.

Trial Examiner Norwood: I agree with Counsel. It does not meet any issue whatsoever, and I sustain the objection.

Trial Examiner Norwood: Well, upon the basis of the discussion of counsel now, I think the entire line should be ruled out, so I shall sustain the objection to this question and give you your exception.

35702 Trial Examiner Norwood: Suppose you make your offer on that and we see what it is. We might reconsider it.

Mr. Werle: Yes. I will do the best I can without the same knowledge the witness has of the subject.

Trial Examiner Norwood: Yes.

Mr. Werle: As I understand it, the objection has been sustained to this line and this is an offer of proof as distinguished from a mere statement to you of only a general nature.

Trial Examiner Norwood: Yes. Let counsel make it clear that the evidence should be received. I can very easily reverse the ruling.

Mr. Werle: We offer to prove through this witness, if Your Honor please, that the Edison Company in the past has made occasional boat load deliveries, that water movement of that character was rather heavy, to about five or six years ago, and there was some, perhaps, demand for

that kind of business; that in more recent years the trend has been entirely toward rail movement; that the reason for the falling off in demand is that movement by boat has to be in very large quantities, and that the customers
35703 have not been taking cement in those quantities in the time of depression; that the size of the boat loads when this company did make some such deliveries ranged from a thousand to three thousand barrels per delivery; that the cost of getting the cement to the point of use in such cases, in this limited experience, has been greater than the cost of getting this cement there all rail; that this company, on the other hand, has never been able to charge the customer a price which included this increased cost because it had to meet the lower competitive prices found at the market place.

I would say, furthermore, in that connection, that this company has never refused any request of any customer for that kind of delivery; that this company has not made any effort to discourage that kind of delivery; and that in such instance, Your Honor please, that is about the gist of the proof.

Trial Examiner Norwood: No evidence of that has appeared yet, so counsel has his objection and exception.

35704 Mr. Werle: Your Honor please, I would like to have the witness, since he is the witness, confirm the offer that I have made because I may have very well misstated something.

Trial Examiner Norwood: He may, yes.

By Mr. Werle:

Q. Mr. Sweeney, you heard the offer I have made. Is that substantially correct, or is there anything in that that you would care to change?

A. No, I would say that that offer of proof is substantially correct.

Mr. Wooden: Your Honor, I would like to strike the witness' answer in confirmation of the offer of proof.

Trial Examiner Norwood: Yes. The motion will
35705 be allowed. It is on the record there to show; it is physically on the record.

That is what you wanted, wasn't it?

Mr. Werle: Well, I wanted to make sure that I had not misstated something. Yes, I think the witness has covered that.

Trial Examiner Norwood: Yes. Well, Counsel, there where an exception is allowed that goes in as evidence, and I think that is a very efficient device for that purpose.

By Mr. Werle:

Q. Mr. Sweeney, coming to another subject: Do you recall the so-called dealer service payment plan about which there has been some testimony in this case?

A. Yes, I do.

Q. Did your company adopt that 5-cent dealer service payment plan?

A. We did.

Q. Do you recall the date when you adopted it?

A. I believe it was in February, 1931.

Q. Well, perhaps I can refresh your recollection as to that in a moment or two.

Prior to the time that you adopted that plan, Mr. Sweeney, what had been the Edison Company's
35706 terms of sale and discounts?

A. Well, prior to that time our destination prices included a 10-cent barrel dealer trade discount and a cash discount of 10 cents per barrel in 15 days.

Q. Can you tell us the circumstances which led up to your adoption of this 5-cent payment plan?

A. The plan had been initiated by one of the large manufacturers, and when we learned of it, picked up a copy of it, analyzed it, we decided it was a pretty good plan, and adopted it for our own company.

Q. Then as to the date upon which you announced it, do you recall how long after you first learned of this announcement by a competitor that your company issued a similar announcement?

A. Oh, it may have been a week, or thereabouts, within a week.

Q. Then if the earliest announcement on that was issued in November of 1930, would that refresh your recollection as to about the date when you sent this out?

A. Yes. My recollection of the date is off, because we would not have waited that long.

35707 The witness identified Resp. Ex. 2564 as a copy of a letter taken from Edison's files dated January 26, 1931, to dealers relating to the so-called five-cent service plan.

Q. Does it give the time that you abandoned that policy?

A. Yes. This letter indicates that we abandoned the policy on January 26, 1931.

Q. Can you tell me the circumstances under which you abandoned the policy?

A. Well, we found that several manufacturers who had adopted the plan abandoned it, and in line with our policy of meeting competition, we abandoned it, also,

35708 (RESP. EX. 2564, was offered and received in evidence.)

By Mr. Werle:

Q. Mr. Sweeney, I show you Respondents' Exhibit 679, which purports to be copy of announcement issued by the Edison Cement Corporation, February 18, 1931. Do you recognize that?

A. Exhibit No. 679 is copy of announcement issued by our company February 18, 1931, outlining our sales policy.

By Mr. Werle:

Q. Can you tell us briefly what the circumstances were under which your company issued that announcement?

A. Well, shortly before this announcement was issued we had discontinued the so-called 5-cent service payment plan following which there seemed to be a feeling of uncertainty on the part of the trade as to just what our sales policy was, and this announcement was issued to clarify the situation, and to make clear to the trade just what our position was.

Q. When you speak of the "trade," who do you mean?

35709 A. Dealers.

Q. Mr. Sweeney, in connection with the question I asked you about the interval between the time that your company started to charge 15 cents more for truck delivery, and the time that the first company in your area abandoned trucking, you testified, as I remember it, that the interval was about six months.

Will you tell me whether or not that is correct?

A. Well, I misunderstood the question. It was actually from two and a half to three years after we put that charge on that this company discontinued trucking.

Q. Now, in this Respondents' Exhibit 679, Mr. Sweeney, which is your company's announcement, there is a reference to a manner in which you proposed to quote the

United States Government, State Governments, and county governments.

35710 Will you tell me what had been the policy of your company with respect to that, which appears in paragraph marked second, prior to the issuance of that announcement?

A. Well, prior to the issuance of this announcement, we had—some time prior to it—quoted the United States Government, State Governments, and steam railroads directly on our minimum price basis; in other words, the so-called dealers' price.

Q. Can you state for about how long prior to that that you had done that?

A. As long as I have been with the company.

Q. Did the statement of your policy in that announcement change your practice or policy in that respect?

A. I believe so, but only with regard to sales to county governments. I believe that was a change in our policy at that time.

Q. Now, in paragraph third of that exhibit, I believe, there is a reference to certain additional classes of work which you were going to sell direct.

Will you tell us to what extent that represented some change in your then existing policy?

35711 A. There was a change in that; under this policy we proposed to sell directly to contractors doing highway work for a State or county, where the contract was financed by State or county.

Q. Well, in any event, does that paragraph, as it stands, represent some change—

A. Yes.

Q. —in your company's policy?

A. Yes.

Q. Can you tell us what were the reasons which prompted your company to make the changes?

A. Yes; for some time prior to the issuance of this announcement it had found competitors making direct sales on the minimum price basis to contractors doing State highway work, and railroad work.

Q. What is the connection between your competitors doing it, and your doing it?

A. Well, we, through this announcement, met that competition.

Q. Now, ~~Between~~ the time of the announcement of this policy, Respondents' Exhibit 679, and the time of the N.R.A. Code, did your company issue any new statement of this policy?

A. No, I don't believe it did.

Q. Can you state whether or not you followed that policy of February 18, 1931, strictly, or whether you made variations or deviations from it?

A. We followed it generally except where competi-
35712 tive positions forced us to deviate in order to make a certain sale.

The witness identified Resp. Ex. 2565 A, B as a copy of a memorandum taken from the Edison files, dated January 26, 1931, to a number of its salesmen, over the signature of R. A. Wetzler, then vice-president in charge of sales. He participated in connection with the discussions in his company about that memorandum to the salesmen. It was issued to its sales force and relates to Resp. Ex. 679.
35713 (RESP. EX. 2565-A and 2565-B, was offered and received in evidence.)

Trial Examiner Norwood: Those were the real reasons for that policy, were they?

The Witness: Yes.

Trial Examiner Norwood: That you issued that. That is, I mean, your reasons for it?

The Witness: Yes.

The witness identified Resp. Ex. 2566-A through
35714 Z-9 as a copy of a so-called sales code which he prepared earlier in 1932 for use by Edison's entire sales organization. Edison had felt the need of such a pocket-sized sales code for some time for its salesmen and therefore designed this. It really stated the policies of his company in effect at that time. It was distributed to Edison's sales organization.

Q. Was it distributed to any competitors?

A. No, sir; it was not.

35722 (RESP. EX. 2566-A through 2566-Z-9, was offered and received in evidence.)

By Mr. Werle:

Q. Mr. Sweeney, according to Respondents' Exhibit 2566-B, if the comparison is correct, this point 8, as to your method of distributing, is in addition to what appears in this Respondents' Exhibit 679 (indicating), and if I am

correct on that, will you explain what was the reason for that additional customer to which you would sell direct?

A. Yes, No. 8, in Exhibit 2566-B, was an addition to the classes of business we would sell direct, as covered by our announcement of February 18, 1931, the reason being that between the time the announcement was issued on February, 1931, and the preparation of this sales code, competition had initiated a policy of making direct sales on the minimum price basis to concrete products manufacturers.

Q. Well, will you explain so we have it once clearly why you find it necessary, or why you found it necessary, to meet that competition, as you have described it?

A. Well, if we did not meet the prices quoted that type of buyers by our competitors, we would be obliged to forego the business, and it is a very substantial business.

Q. I see.

35723 In connection with this last paragraph on page 2566-B does that represent any new policy, or was that something that you had done in the past?

A. No, that last paragraph on Exhibit 2566-B is just a repetition of a policy that had been in force since the issuance of our sales policy in February, 1931.

By Mr. Werle:

Q. Do you still have that policy, that 10 cents per barrel differential, at the present time?

A. No, we do not.

Q. When was that abandoned?

A. I believe that was abandoned during the Code period; 1933.

Q. Now, I notice under section 2 in this sales code, page 2566-C, you have a definition of a dealer (indicating). Will you tell me what was the purpose of that?

35724 A. Well, of course, we had new salesmen coming in to our organization from time to time, and in order that there might be no misunderstanding particularly on their part as to our accepted definition of a dealer, we included that definition in this sales code.

By Mr. Werle:

Q. Do you know whether or not that definition which you have set forth there was compiled or adopted as the result of any understanding or arrangement with any of your competitor companies?

A. No, it was not.

Q. Was that statement of your sales policy as con-

tained in that entire exhibit prepared as the result of any communication or understanding with any of your competitors?

A. No; it was not.

Q. Now, with respect to this statement of your policy on page C of this Exhibit 2566, about selling one dealer in another dealer's area, will you tell me, first, how long that has been the policy of your company?

A. (Witness examines Respondents' Exhibit 2566-C) Generally speaking, we have confined the sale of our products, rather, the shipments of our products, to points within our dealers' natural trading area.

35732 The witness identified Resp. Ex. 2567 A-X as a copy of general instructions to Edison salesmen, issued January 5, 1918, over the signature of Harold M. Scott, Edison's general sales manager. The witness was with the Edison Portland Cement Company when
35733 the pamphlet was prepared and issued. It was used by all members of the sales organization.

Q. Does it represent an accurate statement of the practices and policies of the Edison Company as of that date?

A. Yes.

Q. Can you tell me for how long a period that pamphlet was used by the Edison sales organization?

A. Those instructions were followed generally by our sales organization for a number of years. The first general change, according to my best recollection, being that in—the cash discount,—which was—

Q. When did that change occur?

A. Which was increased from 5 cents to 10 cents a barrel. I believe that came along about 1920 or 1921.

Q. I see.

Will you tell me whether or not you made any reference to that in connection with the preparation of Respondents' Exhibit 2566, which was the sales code?

A. My recollection is that I consulted this in the preparation of the 1932 sales code.

35736 (RESP. EX. 2567-A to 2567-X, was offered and received in evidence.)

35741 By Mr. Werle:

Q. Can you tell me whether or not there was any tendency one way or the other as to direct or dealers' sales during the period from 1932 until the Code?

A. Yes, during the period 1932 until the Code was made effective there was a tendency toward more direct sales.

Q. Did the Edison Company subscribe to and follow the Article XI, which appeared in the N.R.A. Code while it was in existence?

A. Yes, we did.

Q. Can you tell us without going into any detail to what extent, if any, Article XI of the N.R.A. Code changed the practices of your company with respect to marketing methods?

A. My recollection is that they were very few, if any changes, in Article XI of the Code, as compared with our practice, our sales practices at that time.

Q. Now, when Article XI was suspended, what change, if any, did you make in its policy with respect to this subject matter?

A. The tendency was to put more business through the dealers.

Q. Well, did your company make any change in its policy when Article XI was suspended in 1934?

35742 A. I believe we issued a policy, announced a policy in early 1935, providing for a greater tonnage through dealers.

35743 By Mr. Werle:

Q. During the period from the suspension of Article XI, until this announcement of a new published policy in February, 1935, what was your practice—what did you follow?

A. My recollection is we followed Article XI of the Code.

Q. Mr. Sweeney, I show you Respondents' Exhibit 2568, for identification, and ask you if that is the policy you referred to. You said you issued one early in 1935.

A. Yes, that is a copy of the policy we issued at that time.

Q. During the period of the suspension of Article XI, and the announcement of this policy, had you made any effort to—well, not had you made any effort, but were you receiving any expressions from your dealers as to their views on this subject?

A. Yes. There was considerable disturbance on the part of dealers after the suspension of Article XI. Dealers from all over the territory we served were clamoring for a greater percentage of the business through them.

35744 (RESP. EX. 2568, was offered and received in evidence.)

35745 April 4, 1940,
Washington, D. C.

35747 Mr. Hershberger: Your Honor, may I make a short statement?

Trial Examiner Norwood: Yes.

Mr. Hershberger: I have had a talk with Mr. Wooden regarding some proposed corrections of the transcript of evidence given by the witnesses for the Universal-Atlas Cement Company, and we have agreed on all but two of them, and I will submit a letter to Mr. Wooden, so that those may be incorporated in the record. There are two of them on which we were unable to agree, two instances that occurred during the testimony of Mr. Stone, and I would like at this time to ask Mr. Stone to resume the stand, and show him the questions and answers, and ask him whether those are a correct report of the statements that he made. It will take only a minute or two, and then I will withdraw, if I may proceed in that way at this time.

Trial Examiner Norwood: All right.

FREDERICK L. STONE was thereupon recalled as a witness for the Respondents, and, having been previously sworn, testified further as follows:

Direct Examination by Mr. Hershberger.

Q. Mr. Stone, on page 35104 of the record, I asked you some questions and you gave answers to them. I will read two questions and the answer as it was written
35748 by the Reporter, and then I want you to state whether the last answer, as written, is a correct report of the statement that you made:

"Q. Now, in answering about the price decline, try to summarize that briefly along the same lines.

"A. I can make that very brief.

"Q. All right.

"A. If we are about to put our price down because we want to get even because somebody else has made a reduction, the moment we put it down we may say it is effective some time hence, but nobody will buy it from us in the meantime. They will wait until it becomes effective. That is obvious."

Now, I would like to ask you whether that is the answer which you gave to the question which I had asked, and I will hand you the transcript, so that you may examine it.

A. That begins where?

Q. I read beginning at the top of page 35104.

A. I see.

Q. And the answer to the first two questions.

A. I remember the occasion; I remember the intent of my answer, and I am quite sure that the words in the record are not accurate. I do not know that I can repeat the exact words I used, but the sense of my answer was this, that in case of decline, whether we put our price down because we want to, that is, whether we initi-
35749 ate the decline, or whether we put it down because somebody else has made a decline and we cannot sell at a higher price than the reducer of his price has quoted, why, then, in either event, our decline must be made effective immediately on its announcement, because, if we attempted to make it effective at a later date than the date on which it was announced, it is quite obvious that nobody would buy in the interval between the date of our announcement and the effective date of the decline.

Q. The answer, as written by the Court Reporter, says, "because we want to get even." Did you make any statement of that kind that connotated retaliation against some competitor?

A. Certainly not.

Q. I also call your attention to pages 35247 of the record, and 35248, and I will read the last two questions at the bottom of page 35247, with the answer that appears between the two questions, and also the first answer on the top of page 35248, and I will ask you to state then whether the last answer as shown in the transcript is what you said at the time you gave the testimony.

I am now quoting from page 35247:

"Q. Your company had certain portions of Lower Michigan in which it was affected by conditions or practices of the Aetna Company.

"A. We tried to do business in Michigan, and we were affected by such things as you mention, just as we
35750 were in any part of the country where we attempted to do business.

"Q. You were affected by such things as the Huron Company putting in a base at Muskegon.

"A. That would affect such things as we tried to do

in Michigan. Just what that effect was, I do not recall, because I do not remember the figures used as a so-called base price at Muskegon. They may have raised some prices in Michigan, as far as I know."

I would like to have you look at that last answer and state whether it is a correct transcript of what you replied?

A. In the first line I know that I did not say "such things," and if I did I certainly did not intend to say them. It is perfectly clear from the context that the word "business" should be substituted for the words "such things."

Q. So that the answer should have read in what way?

A. This is the first line on page 35248:

"That would affect the business that we tried to do in Michigan."

Mr. Hershberger: All right. That is all. You may cross-examine.

Mr. Wooden: No cross-examination.

Mr. Hershberger: All right. Thank you, Mr. Stone.

(Witness excused.)

35751 FRANK A. SWEENEY thereupon resumed the stand and testified further as follows:

35753 *Direct Examination by Mr. Werle (Continued).*

The witness identified Resp. Ex. 2569 to 2577 A-B as letters taken from the files of the Edison Company, and communications addressed to it by dealers and dealer organizations following the suspension of Article XI of the Cement Code. These communications came to his attention. He further identified Resp. Ex. 2578 as a response to Resp. Ex. 2577 A-B. His "company's" practice, generally, was not to respond to communications of this character.

35754 Q. Can you tell me whether this group of exhibits, Respondents' Exhibits 2569 through 2578, had any bearing upon the policy which your company issued in February of 1935?

A. Yes, they did.

Mr. Werle: I offer these exhibits in evidence.

Mr. Paulson: We object to the offer on all of the

grounds we have heretofore objected to documents of a similar character.

I will restate them, if you wish.

Trial Examiner Norwood: What do you want to show by those?

Mr. Werle: Well, if Your Honor please, they are just communications from customers and groups of customers of this Respondent indicating the way they felt about the sales policy of this company. The witness has testified that communications of that character, of which these were typical, were considered by the company in connection with the issuance of their own sales policy.

Trial Examiner Norwood: The objection is sustained.

Mr. Werle: On the ground that they are irrelevant, Your Honor, and immaterial, or incompetent, or what?

Trial Examiner Norwood: In any sense in which they are relevant they are cumulative.

Mr. Werle: Well, now, Your Honor, they are not cumulative so far as—

35755 Trial Examiner Norwood: I have permitted papers like that to come in to show that generally the dealers approve of these policies, and the manufacturers tried to shape their policies to please their dealers. I do not think it is necessary to go through this whole story with each and every individual Respondent. I am sure that the rejection of it will not prejudice this Respondent in any way.

Proceed.

Mr. Werle: Well, the basis of the ruling, then, as I understand it, is that they are cumulative, not that they are incompetent, irrelevant, or immaterial?

Trial Examiner Norwood: In any sense in which they are relevant they are cumulative. I do not think it is necessary to analyze that any further.

Go ahead.

By Mr. Werle:

Q. Mr. Sweeney, what, generally, was the attitude expressed by your customers and dealers after the suspension of Article XI of the Code? Do you recall what it was?

A. The attitude then expressed generally by the dealers was that more cement should be sold through dealers than had been up to that time.

Q. What was the view that your company took with respect to that?

35756 A. Well, of course, we gave every consideration to the views of our dealers on this important matter since the backbone of our business has always been the dealer end of it, and in shaping our policy, which was later issued, we gave every consideration to going along with the dealers in their views as far as we could and at the same time meet competition.

Q. After you issued your announcement of policy in February, 1935, which is Respondents' Exhibit 2568, do you recall whether or not you attempted to find out what was the reaction of your customers to that policy?

A. Yes. Our salesmen were instructed to discuss this February 21 policy with our dealers and to get their reactions to it.

Q. And do you recall what your experience and observation was regarding the attitude of your customers after this policy was announced?

A. Well, they were only half satisfied with it. It still did not fully meet their desires and ideas on cement distribution.

Q. Did you then issue a subsequent announcement of policy?

A. I believe we issued another policy, two or three months later. I believe it was in April or May, somewhere along there, of the same year.

Q. And can you say whether or not this attitude of your customers concerning your February policy had any
35757 bearing upon your issuance of the April policy?

A. Yes, as it had in the issuance of the previous policy, the opinions and wishes of our dealers was taken into consideration in the formation of the April or May policy, whatever it was.

Trial Examiner Norwood: Did the dealers want all the orders, or all sales to go through them?

The Witness: They have always wanted that, Your Honor; the dealers, as long as I have been in business, wanted every sale made through them.

Trial Examiner Norwood: Did you try to meet that desire?

The Witness: We tried to meet the views of the dealers as far as we could, and still at the same time be competitive. If in following the wishes of the dealers we found ourselves not in position to meet competition, why, we would not stay in business very long.

35760 The witness identified Resp. Ex. 2584-A and B as a copy of a memorandum written by him taken from the files of the Edison Company, dated April 11, 1935, to its sales force with regard to its sales policy 35761 announcement under date of April 9th; Resp. Ex. 2585 as the Edison Company's sales policy, dated April 9th, that was issued to the trade. Resp. Ex. 2584 was issued to the sales organization.

(RESP. EXS. 2584-A, 2584-B, and 2585 were offered and received in evidence.)

By Mr. Werle:

Q. Now, as to this announced or, rather, this announcement of April, 1935, Mr. Sweeney, did you make any effort to discover the attitude of your customers with respect to that?

A. Yes, we did, through our field force.

Q. And can you tell me what your observation and experience as to that was?

35762 A. Well, the dealers, on receipt of the April announcement, were, of course, more satisfied with the situation than they had been up to that time, and as far as we were able to learn there were no serious objections to this April policy on the part of our dealers.

Q. Could your company at that time, as a practical matter, have put into effect a different policy in different parts of your territory for different customers?

A. No, we could not.

Q. Will you explain why?

A. Well, when we announce a policy that policy must necessarily apply to all customers in the same class. In other words, we have got to treat all our dealers the same. We could not have one policy for a group in a New York area and another policy for a group of dealers in some other location.

Q. I am trying to find out if you can explain to us why that is.

A. I do not understand the question, Mr. Werle. Will you put it again, please?

Q. Well, you say that it would be impractical; you say practically impossible to have a different policy for customers of the same class in different areas, and I am trying to find out your experience as to why it would be impractical and impossible to do that.

A. Well, aside from the explanation I have given
35763 you, in following that policy we are meeting competition generally in that respect because that has been the policy of the company as long as I have been with it.

Q. Now, since you issued this policy in April, 1935, Respondents' Exhibit 2585, have you made any changes in that?

A. No. That policy has been followed generally since its issuance except here and there where it has been necessary for us to meet some of our competition.

Q. Can you tell us of any instances where you had to make some variation to meet the competitive condition?

A. Could I look at that copy again, please?

Q. Yes, sir (handing Respondents' Exhibit 2585 to the witness).

A. Well, in the first heading, for instance, we have found competitors making direct sales to the unemployment relief agencies, whereas this policy calls for such business going through dealers. We have also met competitive situations with regard to the sale of cement for bridge construction, quoting that type of work direct; whereas, this calls for sales through dealers.

Q. As to both of those, have you in some cases met that competition?

A. Well, that is what I meant to say, we made the exception to meet competition at that particular time. I do not recall any other differences. There may have been. I do not recall.

35764 Q. Now, as to each of these policies, Respondents' Exhibits 2568 and 2585, were either of those adopted as a result of any understanding or agreement with any of your competitor companies?

A. No, they were not.

Q. What has been your experience in operating under this most recent policy of yours? Have you found that your customers accepted it as fair and equitable, or is it considered arbitrary, and do you consider it arbitrary in that respect?

A. No. Our experience has been that our dealers accept it as a fair method for distributing Edison cement.

The witness identified Resp. Ex. 2586 as a copy of memorandum taken from the Edison files, dated July 31, 1935, written by him to its sales organization. That represents its present policy of dealer distribution.

Q. Can you tell us, Mr. Sweeney, about how
35765 many dealers your company has?

A. Oh, at the present time, we have about 500 dealers.

Q. Can you tell me whether or not that number has been increased, or has it been the same for a number of years?

A. Our dealer accounts show an increase from year to year, so that the number today is greater than it was several years ago.

(RESP. EX. 2586 was offered and received in evidence.)

By Mr. Werle:

Q. Mr. Sweeney, you say in the first paragraph of this exhibit— By the way, you prepared this, did you not?

A. Yes; I did.

Q. That for some time you had the policy of confining shipments to a dealer to his home town. Will you tell us how long your company has had that policy?

A. You had better read a little more than that.

Q. What is known as his normal trading area.

A. It makes quite a difference. We have had that policy for a number of years—ten or possibly fifteen years.

Q. Will you explain what was the reason for hav-
35766 ing that policy?

A. Well, the dealer end of our business is a very important, if not the most important part of it, and it is quite necessary, by reason of that, that we make every effort to retain the good will of our dealers. If we did not respect to some extent the territory into which we make shipments to those dealers by permitting outside dealers to get in there, our dealer business would rapidly disappear.

Q. Now, as I understand it, this memorandum of yours represents some change in that policy?

A. Yes.

Q. Will you explain what the change was, and what was the reason for it?

A. Well, we found in a number of cases competitors were not following the same policy with regard to shipments to dealers that we were following. In a number of cases, a manufacturer would ship a carload of cement to a point possibly twenty or thirty miles removed from the dealer's home town, and while we did not subscribe to this practice, at the same time we found it was costing us

a fair amount of tonnage, and decided to meet that competitive condition, unless by so doing we interfered with some valuable dealer account.

Q. Are you still following the policy that is outlined in this Respondents' Exhibit 2586?

35767 A. Generally, yes, although we very rarely make shipments for account of a dealer to points as far as twenty or thirty miles from his home town.

Q. Do you have any idea, Mr. Sweeney, of the percentage of your business which has been sold to dealers during the past ten years?

A. Through dealers or to dealers?

Q. To dealers.

A. Well, of course, it means the same thing. I would say it averaged over a period of 10 years about 80 percent. Some years it was more and some years less.

Q. And now, Mr. Sweeney, what area does your company come into competition with foreign cement in?

A. In the metropolitan districts of New York, Boston, and Philadelphia.

Q. Has your company adopted from time to time any practices with the purpose of attempting to meet imported cement competition?

A. Yes, we have.

Q. Have you ever initiated any such practices?

A. No; we have never initiated any such practices.

Q. Did you at one time have any policy with respect to selling dealers who were trading in foreign cement?

A. Yes, we did.

Q. Will you tell us the reason for that policy, and why your company adopted it?

35768 A. We had been troubled to a very large extent because of imported cement in the New York and Boston areas in particular, and were rapidly losing ground. When we discovered that one of our competitors had adopted a policy of declining to sell dealers who handled foreign cement, considering them in a sense competitors, we thought that was a good policy, and that it might, at least in some measure, help the situation as far as we were concerned in those areas; so we adopted a similar plan.

Q. Do you have any such policy as that today?

A. No, we do not.

Q. How long has it been since you had that policy?

A. We have not had that, I will say, for five years.

Q. Now, will you explain briefly how your company carried that policy out?

A. Well, our salesmen, in their daily reports on the dealers, and others, included in those reports information on all brands of cement being handled by dealers. Of course, if a dealer handled foreign cement, that information was shown on the reports. That is how we accumulated the data.

Q. Did you, during the period that you had this policy, keep in your office any list of your dealers who were handling foreign cement?

A. No, sir; we had no list, as such. We noted on our
distribution cards any cases where the salesmen re-
35769 ported dealers handling foreign cement.

Q. By "distribution cards," what do you have reference to?

A. Cards showing monthly shipments over a period of years to dealers, with information regarding calls by salesmen.

Q. Is it one card for each customer?

A. One card for each dealer.

Q. Do you recall during the period that you had this policy, whether some of your dealer customers were selling foreign cement for short periods, and then stopped it, and then went back to it again, or were certain ones doing it constantly?

A. Some dealers handled it constantly; others handled it for a while, dropped it, and then went back to it again.

Q. And did you vary your policy as they varied theirs?

A. Yes, we did. If a dealer had been handling foreign cement and discontinued handling it, we were very glad to sell him. Of course, when he later resumed handling foreign cement, we told him again that we could not sell him until he discontinued it.

Q. Was that policy of your company adopted through any understanding or agreement or arrangement with any of your competitor companies?

A. No, sir; it was not.

Q. Was there, to your knowledge, in circulation among your company and any competitors lists of dealers who
were handling foreign cement?

35770 A. No, sir; there was not.

Q. What were the circumstances that caused your company to abandon its policy, Mr. Sweeney?

A. Well, it broke down because we discovered one or two manufacturers selling cement to these dealers who were handling foreign cement.

Q. Now, did you have this policy in each of the markets where you were finding foreign cement competition?

A. Yes; we did.

Q. Apart from this policy which we have been discussing, has your company taken any further action in an effort to meet the foreign cement competition?

A. Well, for a short period—I believe it was in 1935—we learned that some of our competitors had established stocks of cement in Brooklyn, in close proximity to where the foreign cement was coming in, and that they were offering this cement to dealers, who would come there with their own trucks, at a special price, which, as I recall it, was some twenty-five or thirty cents off the price which we had been quoting at that time. We thought that this method might help us to regain some of our lost business in that area, and we adopted a similar policy, by establishing a stock of Edison cement in the neighborhood for that particular reason.

35771 Q. Well, when you established this stock of cement in Brooklyn, did you obtain a warehouse there, or how did you go about it?

A. No; we had no warehouse. We brought the cement in on cars and placed those cars on the railroad siding, the Lackawanna Railroad siding, at Twenty-fifth Street, on a truck siding, and put a man in charge of it, who expedited the loading of dealers' trucks.

Q. Now, was that stock established in Brooklyn by your company in any sense as a cooperative measure with your competitors?

A. No, sir; it was not. It was done selfishly to help us to get our own lost business back.

Q. Did it help you to get some of your lost business back?

A. Temporarily, we did get some of that business at prices, of course, that were ridiculously low, but the plan, itself, only lasted, as I recall it, about six months,

35772 because, while the idea was to enable us to fairly compete, or at least to compete in some measure, with imported cement in the territory where foreign cement was found, the dealers were coming to Brooklyn

from points 50 miles away, so that the purpose was being defeated.

Q. You say they were coming from 50 miles away. Did that affect your company?

A. Yes; it did.

Q. Will you explain that a little bit further?

A. Well, in most cases where these trucks came from long distances, they were very small dealers, who took advantage of their opportunity to make a sale along the line, and it naturally had the effect of disturbing our dealer relations in that territory.

35773 The witness identified Resp. Ex. 2587 through 2602 as copies of memoranda taken from the Edison files, written during the period July, 1931, to November, 1937, some by Mr. "Wetzel," who was then vice-president in charge of sales, and some by the witness, to its field organization urging them on to greater effort, [and] in most cases directing their attention to the fact that its shipments were not up to—. These were instructions to salesmen in the regular course of business of his company, and are typical of instructions which are currently
35774 given from month to month during the period covered.

35776 Mr. Wooden: Well, there is no dispute in this case, Your Honor, and I would like to make that plain that the Respondents have endeavored by communication to their salesmen, both oral and written, to induce the salesmen to sell all the cement they could.

35777 Trial Examiner Norwood: They will be received as marked.

(RESP. EXS. 2587 to 2597, 2598-A, B, 2599 to 2602, inclusive, were offered and received in evidence.)

By Mr. Werle:

Q. Mr. Sweeney, in several of these memoranda which have just been received there is a reference to quotas of the company's shipments for a year. The word "quota" is used frequently. Can you explain what that refers to?

A. Yes. At the beginning of each year we set a quota for the ensuing year which is the minimum number of barrels which we hope to ship during that year.

Q. And how do you determine that?

A. Well, that is determined by considering our ship-

ments for the previous year, and the prospects of
35778 business during the new year, taking into consideration all available information we have on proposed building construction.

Q. Where do you get your information, or from what do you make your estimate as to the prospects of business for the coming year?

A. Well, various services that we subscribe to furnish us with up-to-date information with respect to building, such as the F. W. Dodge Corporation, the Dow Service, Engineering News Record, and a number of other sources of that nature.

Q. Does the statistical information which your company gets from The Cement Institute figure in that to any extent?

A. I do not know what statistical information you have reference to, Mr. Werle.

Q. All right. I will come back to that.

Have you ever set a quota as described in these various Respondents' exhibits that was considered to be a maximum?

A. No, sir; we have never done so. Those quotas are always our minimum figure.

Q. Has there ever been any period during which you have been in a responsible position with the Edison Cement Corporation, or the Edison Portland Cement Company, that the company has had any plan of allocating or sharing business with a competitor company?

A. No, sir.

35779 Q. Has your company or any of the Edison companies with which you have been associated, ever had any arrangement with its competitors to curtail production?

A. No; we have not.

Q. How do you govern the rate of operation, the rate of production, in your plant?

A. I do not know just what you mean by "govern the rate of operation."

Q. What determines it? Do you have a production program or anything of that kind?

A. Yes. Our production manager plans his production program for the ensuing year based on the information which he receives from the sales department.

The witness identified Resp. Ex. 2603 as a memorandum taken from the Edison files, giving information on discount terms, which was prepared at his request.

Q. And does that accurately reflect the discount terms of your company and the Edison Portland Cement
35780 Company during the period covered in the exhibit?

A. Yes; it does.

35781 (RESP. EX. 2603, was offered and received in evidence.)

The witness identified Resp. Ex. 2604 as relating to the trade discount of 10%, referred to in Resp. Ex. 2603. In that instance his "company" initiated this plan of 10 % trade discount, and Resp. Ex. 2604 is an announcement to its trade in connection with that.

35782 (RESP. EX. 2604, was offered and received in evidence.)

Direct Examination (Continued) by Mr. Werle.

Q. Now, Mr. Sweeney, you explained to Mr. Paulson that competitor companies did not follow this practice, and that you had it in effect for six months or a year. Can you explain the circumstances which caused you to withdraw that 10 percent trade discount?

A. Yes.

Q. Will you tell us about that?

A. The purpose of the plan was to quote a uniform price to all dealers, or to all buyers, at the same destination; dealers to receive a trade discount of 10 percent of
35783 the delivered price, exclusive of package; no such discount to be given contractors. Our prices at that time to the United States Government were on the same basis, except that in the case of the Government we termed the discount a Government discount. We were forced to withdraw the plan after six months or a year, because we found competition quoting at lower prices to the consuming trade. We were simply forced to give up the dealer trade discount plan in order to place ourselves in a position to meet this competition.

Q. In this Respondents' Exhibit 2604 is a reference to the elimination of the present uncertainty prevailing on the border line between territories having various differentials. What does that refer to?

A. Prior to the issuance of this policy there had been much unrest on the part of dealers, in that conditions were very unsatisfactory, from their viewpoint, as regards the consumer differentials on cement. The reference here to uncertainty on the border line between territories having differentials was to bordering markets where, in one case, the differential may have been 10 cents, and in the other possibly 15 or 20 cents, which, in effect, made dealers in the same area not competitive.

Q. When you say "differential" you are referring to the differential which these various dealers used?

A. Differentials being observed by the dealers,
35784 being the difference between their cost and re-sale price in carload lots to consumers.

Q. As to the terms of sale and discounts of your company, Mr. Sweeney, have any of them, to your knowledge, ever been adopted or pursued as the result of any understanding or arrangement with competitor companies?

A. No.

Q. Mr. Sweeney, I call your attention to Commission's Exhibit No. 1338, which was an invitation for bids issued by the Procurement Division on March 30, 1938. Do you recall that invitation?

A. Yes, I do.

Q. Did you personally take any part in determining what action your company would take with respect to it?

A. I did.

Q. Will you tell us briefly what happened in that connection, what you did?

A. Mr. Cloos, who was then our vice-president and general manager, and myself, discussed this inquiry quite exhaustively since it was of a nature that neither of us had ever seen before, many things about it that were entirely different to the way we had been doing business, and after giving it full consideration and also following conferences which Mr. Cloos had with our other executives in the home office in Orange, it was decided to submit a bid.

35785 Q. Did you personally study this and make any report to Mr. Cloos about it?

A. Yes. I believe I gave him a memorandum pointing out the features that were at variance with our established sales practices.

Q. Will you tell us what some of those factors were as you recall them?

A. Well, the principal one was the indefiniteness of the proposal. It provided that even though an order might be placed with a manufacturer there was no assurance that the cement would be called for. Furthermore, it did not indicate in any way the point of consumption of the cement. It provided that any manufacturer given a contract should be prepared on fairly short notice to make shipments possibly from Government inspected bins.

It also provided for shipments on work relief projects which in the majority of cases at that time we were furnishing through dealers thus taking away from the dealer business which he had been enjoying. I do not think of any others right now.

Q. Does that cover the variances?

A. There may have been others, but I do not recall right now.

Q. Did you discuss those objections or those indefinitenesses with Mr. Cloos?

35786 A. Yes, I did.

Q. Did Mr. Cloos and yourself make the final determination as to what you would do?

A. No. We felt it was a little beyond us and it was something for the higher executives in our home office to decide.

Q. And as a result of that, what happened?

A. As a result of that we submitted a bid.

35787 Q. Now, as to the prices shown on this bid, Mr. Sweeney, who in your company determined those prices?

A. I requested that certain data be given me, and the price quoted was—

Q. Well, the question is did you determine it or did somebody else, or did you do it in consultation with somebody else?

A. I do not know that I understand the question. I did not personally go through all the records to get the data, but I did recommend what should be done on prices.

Q. And will you explain how you arrived at some conclusion as to what prices you would bid?

A. Yes. As I recollect it, under the terms of this proposal we, as New Jersey manufacturers, were permitted to quote only for the State of New Jersey, and I think

35788 one adjoining county in Pennsylvania.

At that time our destination prices for the greater

part of the State of New Jersey were so-called arbitraries, and not traceable to any mill base, so in order to arrive at the price we quoted we went back over the records from the first of January, 1938, up to the time this proposal was received and computed what mill net realization we had gotten on all our New Jersey business, and that mill net realization, before discount, was $1.45, or within a fraction of that. That is the price we quoted plus package f.o.b. our mill New Village, N. J.

Q. Well, there is a bulk price f.o.b. mill quoted, shown there, $1.40; how does that relate to this $1.45?

A. That is correct. The bulk price is 45 cents less than the price in cloth sacks, or 5 cents less than the mill realization on cloth and paper shipments.

35789 Q. Did the Edison Cement Corporation get an award on that bid, Mr. Sweeney?

A. No, we did not.

35795 Q. Prior to having received this invitation which we have been discussing, Mr. Sweeney, Commission's Exhibit 1339, had your company received any invitations for that, exclusive, f.o.b. mills, for the Federal Government?

A. No; my recollection is we never had.

35796 Q. Mr. Sweeney, I will show you Commission's Exhibit 1399, which purports to be an invitation for bids issued by the Treasury Department, Procurement Division, to be opened May 18, 1938. Did that invitation come to your attention?

A. Yes, it did.

Q. Did you submit a bid in response to that invitation?

A. No, we did not.

Q. Will you tell us why?

A. The reason we did not submit a bid in this case was that having submitted a bid on the Procurement Department's inquiry about a month before, and not having been given the business when we figured we were the low

35797 bidders, that added to the fact that as a result of submitting the earlier bid we had had criticism heaped upon us by our dealers caused us to decide not to put in a bid on this May 5 advertisement. Both inquiries called for an f.o.b. mill price. Since the Government did not take advantage of the proposal we had submitted on the prior bid, we came to the conclusion that they were not interested in f.o.b. mill prices.

Q. When you said that you were the only bidder, do you mean in the area where—in the zone that your company quoted in; is that correct?

A. That is right, in zone 3.

Q. Was there any discussion with or communication with, or arrangement with your competitors with respect to your not submitting a bid on this second invitation?

A. No, there was not.

Q. You mentioned some criticism from your dealer customers. Will you explain that, please?

A. Yes. Of course, this information became public. Every dealer in the country, judging by the number of complaints we had, must have learned all about it, and the principal objection the dealers offered was that through our quoting direct on this inquiry we proposed to take away from the dealers a considerable amount of business which they had been enjoying up to that time, or at that time, which was on work relief projects.

35798 Q. Does your company have occasion to quote in territory where land-grant rates are available to the Federal Government?

A. No, we never have.

Q. I did not hear your answer.

A. No, we have never quoted in that territory.

Q. Has your company ever had any understanding or agreement with any of its competitors, to your knowledge, that it would not submit f.o.b. mill bids to the Federal Government?

A. No, sir; we have not.

35799 Q. Before the luncheon recess, Mr. Sweeney, we were discussing these Procurement Division bids. Now, as to your company in handling public bids generally, can you tell us what is the practice, how you determine the prices that you quote on invitations from the Government, the State Government, other public bodies?

A. We quote our regular commercial prices, our published prices.

Q. And where do you get the information as to the price you will quote, you say your regular commercial price?

A. From the prices we have picked up in the field, through our salesmen and dealers.

Q. How long have you been participating in the preparing of bids and quoting prices to public agencies for your company?

A. Oh, as long as I have been with the company.

Q. And during that entire period, to your knowledge, have any of the bids which your company has submitted been the result of any understanding or agreement
35800 or arrangement with any competitor company?

A. No, they have not.

Q. Now, is the Edison Cement Corporation a member of The Cement Institute?

A. Yes.

Q. And will you tell us when the Edison Cement Corporation joined The Cement Institute?

A. The Edison Cement Corporation joined The Cement Institute shortly before the Code was adopted; I believe it was some time in June, 1933.

Q. And what was the purpose of joining the Institute at that time?

A. To cooperate with the Government in the formation of a Code for the industry.

Q. Now, was the Edison Portland Cement Company a member of The Cement Institute?

A. Yes.

Q. Do you know when it joined The Cement Institute?

A. My recollection is that the Edison Portland Cement Company joined The Cement Institute in 1929.

Q. And did it remain a member until the time of its dissolution?

A. And it remained a member of the Institute until the time of its dissolution.

Q. Did a code of ethics of The Cement Institute
35801 ever come to your attention, that you recollect?

A. No, I do not ever recall having seen a code of ethics of The Cement Institute.

Q. Was there any period, to your knowledge, that your company governed its practices or policies in accordance with any Cement Institute or Cement Institute code of ethics?

A. No, there was not.

Q. To your knowledge was any Cement Institute code of ethics ever distributed among or to any of the members of the sales organization of the Edison Portland Cement Company or the Edison Cement Corporation?

A. No.

Q. Would you have known if it had been distributed?

A. Yes, I certainly would.

Q. Now, there has been reference in the record to a compendium of Established Terms and Methods, Commission's Exhibit No. 561. Did that document ever come to your attention, Mr. Sweeney?

A. The first time I ever saw that Compendium you refer to was in your office in New York about a month ago. Up to that time I had never seen it.

Q. And do you know whether or not the Edison Cement Corporation ever distributed that Compendium among members of the sales organization?

A. No, it never did.

35802 Q. Can you tell me whether or not the Edison Cement Corporation attempted to adopt or conform to any compendium such as the one we are referring to?

A. No, it never did.

Q. Does the Edison Cement Corporation use the freight rate books of The Cement Institute?

A. Yes, we use them.

Q. And did the Edison Portland Cement Company also use them while it was a member of the Institute?

A. Yes.

Q. Has there been any time in your experience in the cement business since 1909, I think you said, when the company with which you were associated did not have some compilation of freight rates in a form substantially similar to that of the Institute rate book?

A. No, there has not, not during my experience. I do not recall a time when we did not have some sort of a freight rate book.

Q. Now, prior to the establishment of The Cement Institute and the Institute rate book bureaus, what was the sort of the freight rate book which the Edison Company used?

35803 A. Well, I think immediately before the Institute published these books we had the services of the Nazareth Traffic Bureau, which was a similar service, and before that the service of the National Traffic Bureau, I believe it was known as, and in the earlier days the books came from the Cement Manufacturers Protective Association.

Q. Now, as to the form and substance of these books, can you tell me whether or not, in your experience, there has been any difference in the form and substance of the

books published by those three organizations and the books published by The Cement Institute?

A. No. They were substantially the same.

Q. Has there been any different use made of The Cement Institute rate books since your companies have had them from the use made of the books of these prior organizations?

A. No.

Q. Now, will you explain the purpose of using some such convenient compilation of freight rates?

A. Well, we use these books because of their concise form, their convenient form, because of the economy involved, their handy reference for information on freight rates in the form that we desire it.

Q. Have any errors in the Cement Institute freight rate books or inaccuracies ever come to your attention, Mr. Sweeney?

A. No, I do not recall having had any errors or inaccuracies in these rates called to my attention.

35804 Q. Does the Edison Cement Corporation have any traffic department?

A. No, the Edison Cement Corporation, as such, does not, but we take advantage of the services free to us by the traffic organization of Thomas A. Edison, Inc.

Q. Do you know whether or not that traffic department checks or examines the Institute freight books in any way?

A. Yes, it has been the custom or practice of our traffic organization at the home office to check these books when they are issued, and to continually check them and bring them up to date as changes in rates are made.

Q. Now, have either the Edison Cement Corporation or the Edison Portland Cement Company, to your knowledge, had any understanding or agreement with any outside agency with respect to the use or non-use of the information provided in The Cement Institute freight rate books?

A. No.

Q. You have explained to us, I think, Mr. Sweeney, the manner in which you obtain information as to your competitors' prices. During the period of the N.R.A. did the Edison Cement Corporation participate in open price filing?

A. Yes, we had to under the provisions of the Code. It was the law of the land.

Q. After the N.I.R.A. was declared unconstitutional, did your company continue to file prices with anybody?

35805 A. My recollection is that we did continue to file prices with The Cement Institute's Trade Practice Committee for a few weeks after the Code went out of existence.

Q. And did you within that period then cease to file prices?

A. Yes. We found that several of our competitors had ceased filing prices, so we ceased filing our prices.

Q. Now, Mr. Sweeney, has the Edison Cement Corporation or the Edison Portland Cement Company, ever had any understanding or agreement to follow or use a basing-point method of pricing?

A. No, we never have.

Q. Have either of those companies, in your experience, and within your knowledge, ever had any understanding or agreement with competitors to sell at delivered prices or in any other particular way?

A. No, we have not.

Q. Have those companies, during your experience and within your knowledge, ever had any understanding or agreement to recognize certain mills as base mills or basing points?

A. No.

Q. Have either of those companies within your knowledge and experience ever had any agreement or understanding with competitors or with anyone outside of those organizations to quote prices which would reflect the lowest combination of some base plus freight?

A. No.

35806 Q. Have either of those companies, in your experience, and to your knowledge, ever had any understanding or agreement to quote prices which were identical with the prices of any other competitor?

A. No.

Q. Have either of those companies, in your experience, and to your knowledge, ever had any understanding or arrangement or agreement to share any sales territory or any sales area with competitors of your company?

A. They have not.

Q. Now, during the period of your examination, I have frequently used the words "Edison Company," and I

think you have also. With respect to that question, will you tell me if you have understood when I have used that expression, and when you have used it to apply it to the Edison Portland Cement Company up to the time that it was dissolved, and to the Edison Cement Corporation from the date that it came into existence?

A. Yes.

Cross-Examination by Mr. Paulson.

Q. Mr. Sweeney, you said you had a number of freight rate services in the course of your experience.

A. (Witness makes no audible reply.)

Q. Were each of these freight rate services of
35807 equal value to you?

A. Yes, we found them about on a par.

Q. Was the service of the National Freight Rate Bureau as valuable to you as the present services?

A. My recollection on that is that perhaps was not up to the standard of the others in that—

Q. Why not?

A. I only know from what I have heard that they didn't have a very large organization, although the rate information that we used at that time, according to my recollection, was comparable to the rate information we had from the other sources.

Q. Why wasn't it as valuable to you?

A. I wouldn't say it wasn't as valuable; it—

Q. Why wasn't it on a par with the other—strike that. Why was it deficient?

A. Well, I, personally, never found that it was deficient.

Q. Why was it—

A. Why? What the reason was, that it might not have been up to a par with the others, I don't know. I never had any experience to indicate to me personally that the service was not as good as the others.

Q. Of what value are any of these freight rate services to you?

A. Well, they are only valuable in so far as they are—
the books are convenient. The rates are shown in
35808 a form that we use them in our business, and they are convenient.

Q. And convenient for what, Mr. Sweeney?

A. For the salesmen who carry them for their particular territories—they can carry them a whole lot more conveniently than they could a long list of freight rates which we might prepare and furnish to them.

Q. You use them mostly for quotation purposes?

A. That is all.

Q. The freight rate books that you have had, including the present freight rate books, make it easier for you to meet competition; is that it?

A. No, sir; I wouldn't say that, freight rate books.

Q. Do they make it more difficult for you to meet competition?

A. No.

Q. Why?

A. They have nothing to do with the meeting of competition. We meet competition—if we want to meet competition, by finding out what the competitors are quoting in the field. Freight rate books have nothing to do with our meeting competition.

Q. That is, I said, do they make it easier for you to meet competition?

A. No, I wouldn't say they do.

Q. They do not make it easier for you to ascertain the prices your competitors are quoting?

35809 A. The use of the books might save us a little time after we have discovered that in a certain territory—the prices being quoted in a certain territory—work back to some constant. Then the information in these books is a convenience to us, in that it would save us the effort involved in checking the competitors' price at every point to which we may ship cement. In that sense I would say they are of a convenience to us.

Q. Well, in a sense, the freight rate books that you now have are—well, are price books, are they not?

A. No, sir; absolutely not.

Q. I don't mean to say—

A. Absolutely not.

Q. I don't mean to say—there isn't a price printed in the book, is there?

A. I wouldn't consider the freight rate books are price books any more than I would consider a list or books that we might prepare in our own organization would be.

Q. They do not carry any prices?

A. Many elements enter into price, and certainly freight is only one of those elements.

Q. Yes, but, as I understood your direct testimony, your destination price is freight rate added to the base,—isn't that what you told us?

A. Not always.

Q. Except in the arbitrary zones.

35810 A. Our destination price, as far as my company is concerned, our destination price is the lowest price that we find at that destination quoted by the competitor.

Q. Well, let us not be too technical. Isn't it your experience that destination price, except for the arbitrary zones at the various destination points that you sell cement, is the freight plus base?

A. We have found that so, generally.

Q. That is generally the case?

A. Yes.

Q. Yes?

A. Yes.

Q. Now, then, I say, in view of that fact, it is safe to say then, generally, a freight rate book is a price book?

A. No, no, not in my opinion. We have never considered it as such; we don't recognize it as such.

Q. Well, you have given—

A. The price that—

Q. You have given it to your salesmen to carry, haven't you? Don't you?

A. I don't know how in the name of common sense anybody could construe a freight rate book as a price book.

Q. Why do you give it to your salesmen?

A. It is given to the salesman—

Q. To indicate to them what price to sell for?

35811 A. No, sir.

Trial Examiner Norwood: Let the witness answer.

A. It is given to the salesmen for their convenience when they furnish information to us on prices that they may find in the field.

By Mr. Paulson:

Q. I did not hear that last.

A. It is given to the salesmen for their convenience in giving us complete information on any prices that they may find in the field. If they find a new price in the field they could quickly use their freight rate book to possibly

discover a constant base at some mill serving that territory.

Q. Well, I understood you to say on direct that you gave—and you correct me if I am wrong—that your salesmen carried these freight rate books so as to know what the price of your cement was.

Is that correct, or not?

A. Well, it is an aid to them after we have—or they have—discovered a constant base price. It is an aid to the salesmen to arrive at a destination price at some point where they may not previously have picked up information on prices being quoted by competition.

Q. Yes. That is the only instructions you give them as to your price, is it not, at those points where you haven't any quotation?

35812 A. I don't understand you.

Q. The freight rate book is the only price information that you place in the hands of your salesmen as to a price at a destination point for which you have not picked up a quotation?

A. Oh, no. In a good many territories we furnish our salesmen with lists of prices which we understand are in effect.

Q. The arbitrary, yes. But where base points control, the only price information you place in the hands of your salesmen is the freight rate book—the freight rate, let us say that.

A. He has to have a lot more than that freight rate book in order to quote a price at destination.

Q. He has to know the base point?

A. Well, we have already determined or discovered the base at a given mill. We have to add to that the freight from that mill, and we have to add to it the package charges.

Q. But if I were in your employ as a salesman, I could take the freight rate book—speaking now of the territories not in the class of arbitraries—and quote your price from that freight book?

A. Well, it wouldn't—

Q. If I knew the base—could I not?

A. If you knew the base, and were certain of it, but you would have to be sure, first, of the base.

Q. Yes.

35813 A. You have to constantly check the field to make certain that the base price that you may quote, or quote on, is the correct one.

Q. Yes, but having checked, I could add, then, the freight in the freight rate book, and that would be your company's price?

A. That might be our price, and we would hope that that was the lowest price at that point if we had not previously picked up a destination price.

Q. Well, now, listening to your testimony, you might get the impression that the prices in your territory changed from day to day,—do they?

A. Well, they don't change from day to day. There were times when they were changing pretty rapidly; but that's some years ago.

Q. As a matter of fact, the destination prices in your territory do not change more than once or twice a year, if that much—do they?

A. Well, I don't know what you mean by that statement —how far you are going back.

Q. Well, we might approach it a little more exactly: How many base points are you affected by?

A. Well—

Q. Generally.

A. When I left New York last week I believe, 35814 generally, we were affected by—oh, I would say about a half dozen.

Q. Is that about the number that you have been affected by for quite a period of time—10 years, say?

A. Well, 10 years ago we were affected by possibly a dozen base points.

Q. But for how long have you been affected by about six, say?

A. Let us see; our market is being confined, and as it is certain base prices don't affect us, the base prices that now affect us have affected us for—oh, about six or seven years, I guess.

Q. Yes, you have about six, you say; that would be Hudson, would it—

A. Hudson.

Q. And Northampton?

A. Alsen, on the other side of the river; Lehigh Valley; the Maine plant; Buffalo, and the Oswego set-up.

Q. What other bases?

A. (Witness makes no reply.)
Q. What other bases?
A. I beg your pardon?
Q. What other bases, I say, are you affected by?
A. At the present time?
Q. Yes.
A. We haven't discovered any more that I can recall.

35815 Q. Well, I do not know as the record shows which ones you are affected by,—where these six are that you spoke about, I thought I would get those.
A. How?
Mr. Brick: Name them, Mr. Sweeney; name them.
The Witness: What are they?
Mr. Brick: Name them.

By Mr. Paulson:
Q. Yes; name them.
A. I didn't get your question.
Q. Just name them.
A. The last information we had on destination prices developed that there were bases at Hudson, N. Y.—
Q. How much?
A. I beg pardon?
Q. What was the price there?
A. What was the base price?
Q. Yes.
A. My recollection is that it was $1.75.
Q. $1.75. Give the price with each one.
A. That's at Hudson.
Q. Yes.
A. We also discovered a base at Alsen, on the other side of the River, Alsen, N. Y., where I believe the base is $1.75.

The base in the Lehigh Valley—which, as I recall,
35816 is $1.55.

The base at the plant in Maine,—I believe that is Thomaston, Me.; I don't recall offhand what that is.

The bases at Buffalo,—I am not sure of those; I think they are $1.60.

And at Oswego, where the Huron Company have their set-up, I think that is $1.65—I am not sure.
Q. Those are all the bases that you—
A. That is all that I recall; I am pretty sure of that.

Q. Then your pricing problem was to keep track of the changes in those base prices?

A. I wouldn't say that. There may be some other bases develop any time. That is why we have to watch the market constantly.

Q. Watch for the development?

A. Beg pardon?

Q. Watch for the development of new bases—changes in bases?

A. We are not concerned particularly with the change in bases; what we are concerned with, particularly, is destination price. If we, from our experience, find the destination price is worked back through some arithmetical relationship to a constant base, then we know from experience that that constant base applies in a certain area.

Q. Yes, but one might get the impression from your direct testimony that these changes are extremely
35817 frequent, and I want to get the picture now as to how frequent they are.

A. Mr. Paulson, we are not in the least bit interested in how frequently these base prices change or do not change.

Q. Yes.

A. All we are interested in is what prices are at destination—

Q. As a matter of fact—

A. —whether traceable to a constant base does not concern us.

Q. No. As a matter of fact, a change in an existing base is news in the industry, isn't it?

A. Well, if it were an advance in price, yes, that would be news.

Q. Well, how many changes have you had, for instance, in your territory, either in the form of the introduction of a new base or in existing bases in 1939?

A. How many were there in 1939?

35818 Q. Do you remember how many changes you had in base mill price in 1937?

A. I have not been trying to keep this stuff in my head. I cannot very definitely recall how many changes in base prices we ran across in 1937. There weren't many, I know that. There may have been two or three. I do not recall.

Q. Speaking generally, over your experience, there would not be more than two or three changes, either in

the form of a change in an existing base or in the introduction of a new base in the period of a year, would there?

A. Well, it will average that. There are times when we—when there were a whole lot more than that.

Q. Yes, 1931, 1932.

A. Taking out that period, over the past 10 years your guess is about right, I should say, that is because of the nature of our business.

Q. Well, in so far as picking up price information in the field goes, you have learned through doing that of the installation of a base at Oswego?

A. Yes.

Q. In the last 10 years, or last 6 years, let us say?

A. Yes, about that.

Q. You have learned of the institution of a base at Buffalo?

35819 A. Yes.

Q. And you have learned of the institution of a base at Thomaston, Me.?

A. Yes.

Q. And that is the extent of the new bases that you have learned of in your sales territory in the last eight years?

A. That is substantially correct.

Q. And you have had probably half a dozen changes in the price in the existing bases?

A. In how many years?

Q. In the last—since 1932, since it quieted down there in 1932.

A. Well, I would not want to say whether the number was six. It might have been six; it might have been eight.

Q. Well, I was just trying to get within a range.

So that on the whole you have not been terribly busy checking prices to ascertain what the prices were that had prevailed?

A. Yes. We would be very much like the fellow in the poker game who sits there all night and never wins a game. He is playing cards. We check the market continuously, whether there is a change in price. I do not see that it makes any difference in the situation.

Q. But you do keep your ear to the ground, so to speak?

A. If our men are not checking the price situation

and every other situation, they do not stay with
35820 us very long.

Q. How many arbitrary areas are there in your sales territory?

A. Just at the present time, the Long Island territory, the Westchester County. I believe that is all there is at the present time.

Q. Just that Westchester County at the present time?

A. Beg pardon?

Q. Just that Westchester County at the present time?

A. And Long Island.

Q. And Long Island?

A. Yes.

Q. You said something on direct to the effect that New Jersey was an arbitrary at the time you bid on this—

A. Yes; yes, a good part of it was; a large part of New Jersey, northern New Jersey, was on an arbitrary basis at that time.

Q. What guide do you have to competitors' prices in an arbitrary zone?

A. What guide do we have?

Q. Yes.

A. We do not have any guide. We discover that information the same as we discover all information with regard to competitive prices. We at that time had our salesmen call up and dealers call up, tell us of these new prices.

From experience we tried to ascertain whether
35821 those new quoted delivered prices were traceable to some constant. We found that they were not.

Q. Do you find that you lose more sales in arbitrary zones because of price differences with your competitors than you do in the so-called base controlled zone?

A. That we lose more business to our competitors in arbitrary zones than we do in the other territories?

Q. Due to price differences.

A. No.

Q. About the same, is it?

A. I would not say there is any difference. There is no appreciable difference. I never looked at it that way, but I would not say there is any appreciable difference.

Q. You are able to know definitely the price that your competitors are quoting in an arbitrary zone, are you?

A. After I find it quoted, yes; but I do not know it until I find it.

Q. In Westchester County is there any key to the quoting of prices?

A. If there is, I do not know anything about it.

Q. The prices at each destination point in Westchester County are not related to each other or to a common point?

A. I do not know what relationship there is, if there is any, Mr. Paulson. I did not initiate prices. We
35822 are just meeting the prices that are found. How they are arrived at I do not know.

Q. We were told by one witness here that the—that a point on the railroads, as I recall, outside of the first point, outside of the city limits, outside of the limits of the five boroughs, as I recall, was a sort of a starting point, that all prices related themselves to that up there in Westchester County.

A. Well, what the method was of arriving at those destination prices, I do not know.

Q. I may not have stated it correctly.

A. I do not know. I never figured, never attempted to figure out. As long as we would get the business by meeting competition, that is all I am concerned with.

Q. Well, would it make any difference to you whether your whole territory were an arbitrary point?

A. Would it make any difference?

Q. Yes.

A. If the arbitraries were high enough, it would be all right with us, but if the entire territory gave us, as a result, a mill net like some of these arbitraries do, it would make a difference.

Q. I mean if the destination prices averaged out the same, would it make any difference to you in the conduct of your business whether the whole territory was an arbitrary?

35823 A. I thought you meant from the dollars-and-cents standpoint. You mean in the conduct of our business?

Q. I mean in the conduct of your business.

A. Would it make any difference?

Q. Would it make any difference if the whole territory were an arbitrary.

A. No.

Q. Did you say "No"?

A. No.

Trial Examiner Norwood: No.

By Mr. Paulson:

Q. It is just as simple for you to meet the competition of your competitors; wouldn't it?

A. I wish it were simple to meet competition of our competitors, as simple as some people think it is.

Q. Well, I am trying to find out whether you find that a convenient means of finding out what price your competitors are *quoting, is a necessity* to you in the conduct of your business.

A. We must know what the competition is. We are price followers, yes.

Q. Is it easier to know what competition is in an arbitrary zone or in a so-called base-controlled zone?

A. Well, it is a little more difficult because you have no constant price that you can check and build up destination prices from. Then you have got to do a
35824 lot of checking.

Q. That is what I was asking you, you have got to do a lot more checking.

A. Yes.

Q. In a base-controlled area it is easier to know what your competition is?

A. It is easier, yes. You save yourself a lot more labor.

35826 Q. Have you ever failed to meet the price that your competitors quoted?

A. Yes. I think I testified to that in outlining markets that we formerly did substantial business in and were forced to withdraw from because of competitive prices.

Q. That is limited to the territory in which you are now selling; have you ever failed to meet the price—

A. That territory in which we are now selling was cut down considerably as late as last summer so that our field is substantially changing from year to year.

Q. Yes; but have you ever failed to meet the price quoted by a competitor?

A. There have been times when we have failed and refused to meet prices quoted by the competition in the territory we are now serving, yes.

Q. Can you name any of those times?

A. Westchester County, several years ago; Queens County, Long Island.

Q. Ordinarily, however, you meet the prices
35827 quoted by your competitors?

A. In this territory we are now selling, yes.

Q. You are apt to lose a dealer, are you not, if you do not?

A. Yes, we had some bad experiences in that regard. When you get out of the market it is awfully hard to get back again.

Q. Isn't it safe to say there that your dealers have reason to believe that you will meet a price quoted by your competitor?

A. I cannot talk for dealers and to give their frame of mind in that regard. They certainly have no assurance from us by word of mouth or letter or anything else that we will always meet the prices quoted by competition.

35831 Q. It was adopted, then—this 15-cent charge was adopted to cover the cost of trucking, and also to prevent trucking, was it not?

A. No, no.

Q. To discourage trucking?

A. No. That was not done. We never had that thought in mind, to discourage trucking. It did not make any difference to us. It was inconvenient, but we had to meet competition at that time, and had to permit trucking, but we did not put that charge on with any thought of discouraging trucking.

Q. Mr. Sweeney, you are not obliged to match prices or follow the action of your competitors when it is unfavorable to customers, are you?

A. At that time we were more concerned with it being more favorable to us. We knew we had additional costs and this 15 cents charge helped us to make up those differences.

Q. It did that, and it also helped to discourage trucking, did it not, whether it was your motive or not, it did help to discourage trucking, did it not?

A. Well, I cannot say that that was our experience; trucking continued for two or three years after that.

Q. This same volume of trucking, even with the 15-cent charge as you had before?

35832 A. I do not recall. I turned the figures in yesterday on that. I do not recall what they were. You have the figures in the record.

Q. Well, you could not have made a 15-cent charge for trucking if your competitors had not made a 15-cent charge for trucking, could you, Mr. Sweeney?

A. Well, if we had, we would not have gotten any of that business. We have never been able to get a higher price than the other fellow at any time in my experience in the cement business.

Q. In other words, in order for a 15-cent charge for delivery to trucks to prevail in the sales territory in which you do business, all of the cement manufacturers in the area had to adopt a charge?

A. You are making that statement, or are you asking me the question?

Q. I am asking you that from your experience.

A. I would not say so necessarily.

Q. If one of them did not put the charge on, the others, the rest, as I understand your testimony, would have to withdraw theirs; isn't that true?

A. No, that does not necessarily follow there. That one fellow, at least, would not get the—would not get the bulk of the business, perhaps, or get a good part of the business. The question then arises whether he
35833 wanted that much trucking business.

Q. Well, now, then, what conferences or communications or exchanges did you have, if any, with your competitors or agents of your competitors with regard to trucking?

A. None whatsoever.

Q. You had none?

A. No, sir.

Q. You talked to no one, or had no one—

A. No, sir; I did not.

Q. In other words, you picked up the information in the field and followed that?

A. That is correct.

35838 Q. You did finally adopt a policy of making no deliveries to trucks, did you not?

A. That's right, yes.

Q. Yes. When was that?

A. We discontinued deliveries to trucks, I believe, in 1932, some time.

Q. Well, I was asking you, then, that the demand for deliveries to trucks was a continuing thing for over a period of years, wasn't it?

A. Well, we made deliveries to trucks from 1929 to 1932.

Q. Were your negotiations with dealers principally through dealer associations, Mr. Sweeney?

A. We never had any negotiations through or with dealer associations.

Q. Well, did your communications from dealers come largely from your dealers' associations?

A. No, I would say—

35839 Mr. Werle: Now, Your Honor—

A. —by far and large the communications we had were from dealers.

By Mr. Paulson:

Q. Private—

A. Not from associations.

35841 Q. You told us, Mr. Sweeney, that you received varying requests from dealers. Will you explain to us how you arrived at a decision on what policy to follow under those circumstances?

A. You are now referring to our sales policy in 1932 or 1935?

Q. 1935.

"Will you explain to us how you arrived at a decision on what policy to follow under those circumstances?")

A. Well, about that time there was considerable unrest on the part of the dealers because of the elimination of Article XI of the Code. Dealers naturally were clamoring for more and more business to go through them. I 35842 believe we found announcements in the field by one or two of our competitors outlining their policies which we picked up. Those plans looked pretty good to us, and I believe our announcement in February, 1935, incorporated some of those sales policies.

By Mr. Paulson:

Q. Yes, in determining dealer policies you have two principal factors to consider; namely, dealer demands and competitors' policies,—isn't that true, Mr. Sweeney?

A. That is very true because we must be competitive if we want to stay in the business. We have to take cognizance of every action on the part of competition.

Q. So, whatever your dealers might say to you would not necessarily determine your policy,—you have to be guided as well by what your competitors will do?

A. Not altogether, no. There may be times when we have gone along with dealers on policies of our own without considering any group of dealers—or manufacturers, or any individual manufacturer.

Q. Do you personally decide your dealer policies of your company?

A. Well, I recommend them and they are decided after I confer—myself and Mr. Hildebrand, our general manager.

Q. Did you have any contacts at all with persons outside of your organization before you established your policy in 1935?

A. No, I did not.

35843 Q. What differences existed between your dealer policy and the dealer policies of your competitors, in view of the objection to the—the present tense there—I will ask you that as of 1936.

A. What differences? I don't recall, Mr. Paulson, what differences there were; there may have been some differences, I don't know.

Q. Well—

A. I can say this, if our policy wasn't as acceptable to the dealers as the policies of our competitors, we would soon know about it, and perhaps lose a few dealers.

Q. Can you name any differences in terms and conditions of sale that your company used in 1936, from those used by your competitors?

A. I don't recall any, no. They must have been every bit as good to the dealers as the competition was offering, or we couldn't sell any cement.

35844 Q. It is substantially correct to say that the dealer policies of you and your competitors are identical, is it not?

A. No, I wouldn't say it is.

Q. Well, identical in all material respects—identical. Will you answer that, please?

A. Well, in order to answer that question truthfully, I would have to compare our policy at that time with

35845 policies of all our competitors, but I can't answer the thing as the question is put.

Trial Examiner Norwood: Do you recall any differences?

The Witness: No, I do not.

Q. Mr. Sweeney, you spoke of an economy to you through the use of Cement Institute freight rate books. Will you explain how they are economical to you?

A. Well, we only use about twenty-five or thirty copies. I know that we could not possibly have those books pre-

pared, ourselves, in that form at a cost that would
35846 compare with the cost to us by The Cement Institute.

Q. Do you know, from your own knowledge, whether your company uses those freight rate books of The Cement Institute in preparing your shipping instructions and bills of lading?

A. No, we do not. We use the official tariffs when we show our freight rates on the bills of lading.

Q. In other words, your company ascertains the freight rates between your mill and each of the destination points to which you ship cement from the official tariffs, does it not?

A. Yes, we do.

Q. You have that freight rate information in convenient form for ready reference, do you?

A. You are referring now to the tariffs of the plant?

Q. Yes.

A. When we make up the invoices?

Q. Yes, the freight rate information which you use on your bills of lading, and your shipping instructions,—that is what I am referring to.

A. I can—

Q. Do you have that on cards, or some other—

A. I don't know what form it is in, Mr. Paulson. I have never seen it, but I imagine it is in some convenient ready form. I don't know. I have never taken the trouble to look at it.

Q. You could use the information that you have
35847 ascertained from the tariffs to quote prices on, could you not?

A. If we knew the destination prices, yes.

Q. That is what I am trying to find out why you consider there is an economy—any economy—in your having The Cement Institute freight rate books.

A. Well, if we didn't have the rates in that form we would have to make up books of our own, or lists, or compile the data in some form for our office use, for the use of those salesmen who generally use the freight rate information.

Q. It would not cost you much more to print up a freight rate book, since you already have the freight information, than it would to publish a set of quotations, would it?

The Witness: I don't get the connection there between the freight rate book and the quotations.

By Mr. Paulson:

Q. Well, you serve about how many destinations, Mr. Sweeney?

35848 A. Let us see if I get that correctly, now. Do you want to know how many destinations we serve, or how many destinations we quote when there is a price change? Which?

Q. Give me the number you serve, first, please; if—

A. Well, by "serving"?—

Q. Make sales to in the course of a year.

A. Well, that's what I wanted to clear up.

Q. Yes.

A. Oh, perhaps six hundred, seven hundred.

Q. You have ascertained the freight rate from your mill to those six or seven hundred destination points in order to have information from which to give shipping instructions or make out bills of lading, is that not correct?

A. That's correct, yes.

35849 Q. Yes. Well, how many destinations are you interested in?

A. Our quotation lists contain approximately 3,000—between three thousand and three thousand five hundred destinations.

Q. So that you would have to print up a freight rate list of 300 destinations, would you not?

A. Did you say three hundred?

Q. No, no, I mean three thousand.

A. At least three thousand.

35850 Q. In other words, you would have to know 3,000 freight rates in order to be in a position to issue your quotations?

A. No; just having the freight information from our plant is not sufficient.

Q. But it is sufficient for shipping purposes?

A. It is sufficient for shipping purposes after we know what the destination price is, because all we are interested in, then, is the freight rate from our plant to the destination.

Q. It would be a comparatively simple matter to print the freight rate information that you absolutely need for shipping purposes?

A. I don't know. I am no expert on printing affairs, or anything of that nature, but—

Q. Well, you publish 3,000 quotations, and the publishing and collecting of 3,000 freight rates into a pamphlet would not cost you any more than publishing 3,000 quotations?

A. I don't get the point of your question.

Q. So far as printing costs are concerned.

A. We have the freight rate information that we need from our own plant in the freight rate tariffs at our plant office, and those are the files from which we get the rate information for our invoices.

Q. Not having any firsthand knowledge of the cost of printing, you cannot tell us just what the cost would be in publishing the freight rates and the collection of freight rates to the 3,000 destination points to
35851 which you quote; is not that correct?

A. What would we do with them after we publish them?

Q. Now, you said that the freight rate books of the Institute—you said it inferentially, if not directly, in a previous answer—gave you some information as
35852 to freight rates from competitors' mills to these various destination points. Why is that a convenience to you in the conduct of your business?

A. Well, it is convenient in quoting prices at destinations, where we had not previously picked up the competitive quotations. After we had picked up a number of those quotations, as I testified, and discovered that they worked back to some constant mill base, we assumed that that mill base is applicable through a certain area. Therefore, with the rate information we have, it is not necessary to check every point in the territory. We have the freight rate.

Q. Do you make your quotations partially on the basis of information that you pick up in the field, and partially with the help of the Institute freight rate books?

A. Well, we are using a freight rate book, but they do not have to be necessarily The Cement Institute book. Usually, I have been told from those in our organization who know more about the cost of these things than I do, that information in these books and the form it is in is purchased at a price that we could not possibly buy the

books for if we put it out ourselves. There is no reason in the world why we have to use these books. We could use the information in some other form.

Q. You sell and ship to purchasers how many miles from your mill, Mr. Sweeney?

35853 A. Do you mean the farthest distance that we ship?

Q. Yes; the greatest distance.

A. Well, we make some shipments up into Maine—spotty shipments. I guess they would be the farthest shipments.

Q. Do you know how many—

A. Well, our business in Maine the last year aggregated, my best recollection is, three or four thousand barrels.

Q. Do you know the distance, the rail distance, the rail mileage, between your plant and—

A. Up to those isolated points?

Q. Yes.

A. The distance from our plant would probably be 250 or 350 miles—somewhere in there. I don't know. I have not checked it.

Q. What is the farthest town in Maine to which you have shipped?

A. My recollection on that is very hazy.

Q. Have you shipped to Bangor?

A. I couldn't say truthfully, because I don't recall, Mr. Paulson. I know we make some shipments into Maine.

Q. Do you go an equal distance in a southerly direction?

Mr. Werle: If Your Honor please, if Mr. Paulson is really seeking factual information, I suggest that he refer to a map which we put in, which shows the distances and shows the points where this company solicits and

35854 sells. If he is testing the memory and recollection of the witness, that is another matter.

Mr. Paulson: I thank Mr. Werle for his discussion. I had forgotten it.

Trial Examiner Norwood: He may be testing his memory.

Mr. Paulson: No, I was not.

Mr. Werle: If he is, it is all right.

Mr. Paulson: I was seeking information, and Mr. Werle reminds me that we have it.

By Mr. Paulson:

Q. Did you receive many requests, or any requests, from dealers in the metropolitan areas where foreign cement was on the market, asking you to confine your sales to the dealers handling domestic cement?

A. No; I do not recall any requests from dealers along those lines.

Q. Have you read the testimony taken in this case up to date, Mr. Sweeney?

A. If I had, I would probably have lost my happy home. I read as much as my wife would permit me to read.

Q. Were you cited to any particular portions of it by counsel?

A. No, I was not.

Q. Have you read extensively in the record, Mr. Sweeney?

35855 A. Well, I have probably read about twenty or twenty-five percent of it.

35856 Q. Mr. Paulson asked you also about your company's practice of meeting the prices that are quoted by your competitors. As to that, will you tell me what your practice has been with respect to meeting deviations by competitors from published prices?

A. We, in my experience, have not, that I can recall met any prices quoted, or, rather, prices made, by any manufacturer below published prices.

Q. It has or has not been your practice?

A. It has not been our practice.

Q. And do you or do you not find that there are deviations?

A. Yes, we find deviations from published prices.

35857 Q. Now, I believe you stated in response to one of Mr. Paulson's questions that it was necessary for you to get out your quotations in a hurry when you made or followed some price change. Will you explain why you must get your quotations out in a hurry?

A. Well, we want our customers—the thought behind it is to let our customers know what our position is in connection with any change in the market, let them know as quickly as we can.

Q. Well, now, could you or could you not accomplish that purpose without having some compilation of freight

rates covering the points in the area where you sell your cement?

A. We could not do it as quickly, no.

35860 By Mr. Werle:

Q. Well, what has been the policy of your companies, Mr. Sweeney, with respect to discussing matters of your company policy with groups of dealers or with groups of dealer associations?

A. Our policy in that regard is not to discuss our company policy with dealer groups or organizations.

Q. And can you tell me whether or not that policy is —has been and is known to your sales department?

A. Yes, it is.

Q. And the sales staff?

A. Yes.

Q. Can you tell me whether or not that policy has been violated so far as your own knowledge is concerned?

A. It has not, so far as I know, and I should know.

35861 *Recross-Examination by Mr. Paulson.*

Q. Mr. Sweeney, do you make up the quotations which you issue by using the freight rate books of The Cement Institute, taking from those books the freight rate, or any of those rates, to the prevailing or applicable base and putting the sum of the two factors on the quotation as the quoted price?

A. After we have reasonably satisfied ourselves that we have discovered the price basis applying to a given area, the books form a convenient way of our getting these quotations out promptly; that is correct.

Q. You do use them, then, in making up your quotations?

A. Yes, we do.

Q. To the extent that you say?

A. That is correct.